TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. ~~158~~ 246.

AMELIA L. HOWARD, HARRIOTT S. HARDEE, CAROLINE A. OWEN, ET AL., APPELLANTS,

vs.

P. DE CORDOVA, W. R. BOYD, F. E. HILL, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED APRIL 1, 1899.

(17,343.)

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SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	1
Exhibit A—Record in case of De Cordova *vs.* Smolerski *et al.*	10	8
Summons	12	9
Order appointing attorney for defendants	14	11
General denial	14	11
Agreed testimony	14	12
Report of commissioners	15	13
Decree confirming report, &c.	17	15
Clerk's certificate	18	16
B—Letter of W. R. Boyd to James S. Zacharie, May 16, 1892	19	16
C—Statement of collections and disbursements on account of the Riondo grant by J. De Cordova	20	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 8, 1899.

	Original.	Print.
Amended bill of complaint	22	20
Exhibit F—Articles of agreement between James W. Zacharie and Jacob and Phineas De Cordova, February 26, 1852	28	24
G—Assignment from J. De Cordova to J. W. Zacharie, May 7, 1860	30	26
H[1]—Deed from P. De Cordova to W. R. Boyd, July 2, 1895	30	26
J—Deed from W. R. Boyd *et al.* to F. E. Hill, December 10, 1895	32	28
K—Deed from W. R. Boyd *et al.* to Chas. Robertson, December 10, 1895	34	29
H—Deed from W. R. Boyd *et al.* to Geo. W. McAdams, February 28, 1896	36	31
L—Deed from W. R. Boyd *et al.* to J. M. Parker, October 30, 1897	38	32
M—Deed from James W. Zacharie to Joseph Smolerski, August 19, 1865	40	34
N—Protest of notes of Smolinski	45	38
Demurrer to amended bill	49	43
Final decree	52	45
Assignment of errors	53	46
Petition for appeal	54	47
Order allowing appeal and certifying question of jurisdiction	55	47
Bond on appeal	56	48
Clerk's certificate	59	50

1 *Caption.*

Be it remembered that at a term of the circuit court of the United States in the fifth circuit thereof and in and for the northern district of Texas, at Dallas, begun and holden at Dallas, Texas, on the 9th day of January, A. D. 1899, and which term adjourned on the 4th day of March, A. D. 1899—the Hon. Edward R. Meek, United States district judge for the northern district of Texas, presiding—the following proceedings were *and* and the following cause came on for trial and was tried, to wit:

AMELIA L. HOWARD ET AL.
vs.
P. DE CORDOVA ET AL. } No. 487. Equity.

2 *Original Bill, July 7th, 1898.*

THE STATE OF TEXAS,
County of Limestone.

To the honorable the judges of the circuit court of the United States within and for the northern district of Texas, at Dallas, Texas, sitting in equity:

Amelia L. Howard and Harriet S. Hardee, both widows, and Francis C. Zacharie, James S. Zacharie, Caroline A. Owen, a widow, and Emma C. C. Zacharie and Florence D. Zacharie and Florence F. Ellis, a minor, suing by her next friend, James S. Zacharie, all of whom are citizens and inhabitants of the State of Louisiana, bring this bill against P. De Cordova, a citizen and inhabitant of the county of Travis and State of Texas, and W. R. Boyd, F. E. Hill, Charles Robertson, J. M. Parker, and George W. McAdams, citizens and inhabitants of the county of Freestone and State of Texas, and Joseph Smolenski, who is not an inhabitant of or found within this district; and thereupon your orators complain and say that on Nov. 9th, 1895, P. De Cordova filed a suit in the district court of Freestone county, Texas, against the unknown heirs of J. W. Zacharie, deceased, and against Joseph Smolenski, whose residence in said suit was alleged to be unknown; and afterwards, on the 8th day of Sept., 1896, the district court of Freestone county, Texas, appointed R. L. Williford, a practicing attorney of said district court, to represent the unknown heirs of J. W. Zacharie, deceased, and Joseph Smolenski, and on said day said cause was tried and a judgment rendered, as hereinafter stated and as shown by a certified copy of the transcript of said cause from the district court of Freestone county and of the judgment in said cause, which is made an exhibit in this cause and referred to as Exhibit "A."

Your orators respectfully represent that they are the only heirs of J. W. Zacharie, dec'd, who died on June 1st, 1870, who left his wife, Caroline E. Zacharie, together with your orators, surviving him,

and Caroline E. Zacharie died on June 4th, 1889, leaving your orators as her only heirs.

Your orators show that in said suit in the district court of Freestone county, Texas, service by publication was obtained upon said unknown heirs of J. W. Zacharie and J. Smolenski, said publication being made not in a newspaper published at the county-seat, but in an obscure journal or newspaper published at a point remote from said county-seat, whereby no notice could be given to said
3 heirs or their duly authorized agent in said county, and your orators knew nothing of said suit or its pendency until some time after the rendition of the judgment therein, and were as a consequence not represented by an attorney of their own selection.

Your orators further represent that the defendant W. R. Boyd was the attorney of P. De Cordova in his suit in the district court of Freestone county, Texas, and made the affidavit to procure service by publication on your orators, and that on May 16th, 1892, he addressed to one of your orators the letter marked Exhibit "B" and hereto attached, said letter being addressed to James S. Zacharie; and your orator further represents that at the time of making said affidavit both P. De Cordova and W. R. Boyd fully knew the names of and placed of residence of the heirs of J. W. Zacharie, both by correspondence with some of the heirs and with other persons and by personal interview between P. De Cordova and one of the heirs, especially the names and residences of F. C. Zacharie, Mrs. A. L. Howard, widow of R. A. Howard, one of the heirs, and also J. S. Zacharie, another of the heirs, the last of whom was managing the property and representing the interests of himself and the other heirs to the property to the full knowledge of both said De Cordova and said Boyd.

Your orators further show that the defendants Hill, Robertson, Parker, and McAdams are setting up a claim to portions of the land hereafter described, under deeds from W. R. Boyd, with notice of your orators' rights and of the infirmity of the title so derived from Boyd.

They further represent that when service of citation by publication has been obtained in actions brought in the State of Texas, and when the defendant has not appeared in person or by an attorney of his selection, the law of said State of Texas provides that a new trial may be granted by the court upon the application of defendant, for good cause shown, supported by affidavit, at any time within two years from the date of the rendition of the judgment.

Your orators further respectfully show that their deceased father, J. W. Zacharie, being the owner of eleven leagues of land situated in Freestone and Anderson counties, Texas, and granted to Manuel Riondo by the State of Coahuila and Texas on the 26th of Feb., 1852, made a contract with Jacob and Phineas De Cordova, in which the said Jacob and Phineas De Cordova undertook to have the said Manuel Riondo grant placed and located on the maps in the gen. land office in the State of Texas, and to compromise with those who were claiming portions of said land by junior locations in the

best possible manner or make sale of said land in such man-
4 ner as will tend to the interest of James W. Zacharie free of all expense to him, and, in consideration of these services by them to be rendered, J. W. Zacharie agreed to make full title to one-third of all the lands which shall be secured with a clear title by compromise or survey, and to allow the said De Cordovas one-third of all receipts made by sale of said land by way of compromise, the said J. W. Zacharie to be put to no expense on account thereof except the payment of the taxes due on said land.

Your orator- shows that in pursuance of this contract Jacob and Phineas De Cordova made some compromises or sales to those who claimed under junior grants, and the exact amount of land so sold or compromised your orators are unable to state, but it is about 10,000 acres. These compromises and sales were made prior to 1861, and the said De Cordovas made settlements with J. W. Zacharie in accordance with the terms of the contract aforesaid, the said De Cordovas receiving one-third of the amount for which said lands sold and paying over two-thirds thereof to J. W. Zacharie, as is shown by the attached accounts, marked Exhibit "C," and yet J. W. Zacharie or his heirs, your orators, were charged in the partition with all these lands and the Cordovas charged themselves with nothing.

On May 7th, 1860, J. De Cordova acknowledged in writing a settlement with J. W. Zacharie of all of said compromises and sales in full and relinquished to said Zacharie all his right, title, interest, and claim in and to the Riondo grant of eleven leagues in any shape or form and declared the said contract is cancelled and annulled, which is shown by the statement of facts on file in the said cause of P. De Cordova *vs.* The Unknown Heirs of J. W. Zacharie *et al.*; and your orators charged that this destroyed and annulled the contract as to P. De Cordova. Nothing was ever afterward done under said contract by J. De Cordova nor by P. De Cordova, unless the dismissal of some suits in the hon. U. S. circuit court at Austin should be deemed to be an attempt to perform said contract by P. De Cordova, until the institution of the suit before mentioned in the district court of Freestone county, Texas, on the 9th of Nov., 1895.

Your orators further represent that the contract of Feb. 26, 1852, was simply a contract to convey to Jacob and P. De Cordova one-third of the land on the Riondo grant, that the said De Cordovas might secure with a clear title by compromise or survey and not a conveyance, nor was said contract a contract to convey one-third of
5 said Riondo grant, but only one-third, as before alleged, of what the said De Cordovas might secure with a clear title by compromise or survey; but, notwithstanding the plain import and meaning of said contract, the said P. De Cordova and W. R. Boyd conspired and confederated together to deprive your orators of their land, and W. R. Boyd filed the aforesaid suit on Nov. 9, 1895, and beguiled the court into the belief that said contract dated Feb. 26, 1852, was a deed or transfer by J. W. Zacharie to Jacob and P. De Cordova of one-third of the entire Riondo grant, less the sales made thereof, except the sale to Smolenski, and said suit was brought for partition upon an allegation that plaintiff was the owner

in fee-simple of one-sixth of the entire Riondo grant, and on the 8th of Sept., 1896, the said W. R. Boyd and P. De Cordova took judgment for partition against your orators and J. Smolenski for the amount of land they asked for in their partition.

Your orators show that, in pursuance of the combination and confederation above alleged, P. De Cordova conveyed to W. R. Boyd a tract on said Riondo grant supposed to contain 792 acres of land and bounded as follows:

Beginning at S. W. corner of A. Webb tract in J. Korn league line, a B. J. 10 in. in dia. brs. S. 37½ E. 3 vrs.,

Thence E. with Webb's S. line 1,150 vrs., his S. E. corner, a B. J. 6 in. in dia. brs. S. 52 W. 3 vrs.; do. 12 in. in dia. brs. N. 46 W. 6 vrs.;

Thence N. with Webb's E. line 483 vrs. to stake;

Thence E. 840 vrs., stake;

Thence S. 1,075 vrs., stake in A. P. Vaugh N. line, a B. J. 10 in. in dia. brs. N. 18 E. 13 vrs.; a do. 3 in. in dia. brs. N. 10 W. 5½ vrs.,

Thence W. 350 vrs., stake, a B. J. 14 in. in dia. brs. S. 55 E. 3¾ vrs.; a do. 12 in. in dia. brs. N. 67 W. 11 vrs.;

Thence S. 334 vrs., stake, a B. J. 10 in. in dia. brs. S. 83 W. 9 vrs., being James' N. E. cor.;

Thence W. at 776 vrs. N. E. corner of Wm. Gardner's survey; at 1,677 vrs. to a point where said Gardner survey crossed M. Riondo 11-league line;

Thence N. 35 W. with said 11-league line 2,832 vrs., stake;

Thence E. with the Childs tract 1,775 vrs. to Childs' S. E. corner, stake in A. Webb's W. line, a P. O. 16 in. in dia. brs. N. 45 W. 3 vrs., a P. O. 15 in. in dia. brs. S. 53 W. 6 vrs.;

Thence S. 1,490 vrs. to beginning, situate in Freestone Co., Texas.

And your orators upon information and belief allege that said conveyance was made by P. De Cordova to W. R. Boyd as a fee for bringing and prosecuting the suit in the district court of Freestone county, Texas, before mentioned, and in pursuance of the judgment rendered as aforesaid in the district court of Freestone county, Texas, the following-described land was set apart to P. De Cordova:

Beginning on W. bank of Trinity river, on S. B. line of Manuel Riondo 11-league grant,

Thence up said river with its meanders to M. Hunt's S. E. corner, which is a hackberry 8 in. in dia. for corner, and a hackberry brs. N. 40 E. 3 vrs.;

Thence S. 59 W. 2,744 vrs., stake; B. J. 7 in. in dia. brs. S. 40 E. 4 vrs.; B. J. 8 in. in dia. brs. N. 74½ E. 12 vrs.;

Thence N. 31 W. 1,480 vrs., red oak 15 in. in dia. brs. N. 68 W. 3 vrs.; hickory 6 in. in dia. brs. N. 60 E. ½ vr.;

Thence S. 60 W. 950 vrs., stake; B. J. 10 in. in dia. brs. N. 60 E. 19 vrs.; P. O. 12 in. in dia. S. 51 E. 26½ vrs.;

Thence N. 30 W. 798 vrs., stake; hickory 9 in. brs. N. 3 W. — vrs.; hickory 10 in. N. 82½ E. 7 vrs.;

6 Thence S. 60 W. 908 vrs., B. J. 8 in. for corner;

Thence S. 30 E. 2,572 vrs., stake;

Thence S. 60 W. 1,062 vrs., stake;

Thence N. 30 W. 1,062 vrs., stake on Hiram Lott's S. line;

Thence S. 60 W. 255 vrs., S. W. corner of Lott's, a hickory 8 in. brs. N. 783 vrs.; a hickory 3 in. brs. N. 16 E. $2\frac{5}{10}$ vrs.;

Thence N. 30 W. 1,200 vrs., stake; hickory 12 in. brs. N. 79 E. 2 vrs.; B. J. 15 in. brs. S. $7\frac{1}{2}$ E. 9 vrs.;

Thence S. 60 W. 760 vrs., stake in Geo. Jones' E. line;

Thence S. 30 E. 136 vrs., stake; B. J. 14 in. in dia. brs. S. 45 E. 7 vrs.; P. O. 10 in. brs. S. 32 E. 10 vrs.;

Thence S. 60 W. 839 vrs., stake the N. E. corner of W. L. Edward, Jr., 150-acre tract;

Thence S. 30 E. 1,200 vrs., Edwards' S. E. corner;

Thence S. 60 W. 705 vrs., Edwards' S. W. corner of 150 acres;

Thence N. 30 W. 248 vrs., stake;

Thence S. 60 W. 752 vrs., stake, S. W. corner of Edwards' 100 acres;

Thence N. 30 W. 1,800 vrs., stake;

Thence S. 55 W. 2,797 vrs., stake;

Thence S. 35 E. 4,391 vrs., stake on S. B. line of 11 league-;

Thence N. 55 E. 9,763 vrs., stake in W. line of Hugh Henderson'-640-acre survey;

Thence N. 31 W. 723 vrs., stake in field;

Thence N. 59 E. 1,900 vrs., stake in Henderson's E. B. line;

Thence S. 31 E. 590 vrs., stake in 11-league line;

Thence N. 55 E. 1,294 vrs. to stake on river bank, to the beginning, containing 7,326 acres and situate in Freestone county, Texas.

And the report of said commissioners was confirmed by said district court of Freestone county, Texas.

Your orators respectfully show that the plaintiff P. De Cordova was not entitled to partition of the Riondo grant, because he had no interest or title therein; and they further show that the said P. De Cordova had an action of specific performance upon the contract of Feb. 26, 1852, which action your orators are advised and believe was not only abandoned by said P. De Cordova for more than twenty years, but that said cause of action was barred by the statutes of limitation of the State of Texas; and your orators further charge that they are advised and believe the said P. De Cordova's cause of action for specific performance, if not abandoned and barred by limitation, could not have been enforced under said contract of Feb. 26, 1852, because of non-performance on his part and payment in full for partial performance of said contract prior to 1860, as hereinbefore alleged.

Your orators further show that if they misinterpret the meaning of the contract of Feb. 26, 1852, and it should be held that P. De Cordova was entitled to partition of the unsold part of the Riondo grant, yet the partition made in said cause in Freestone county was grossly unjust to them, because the 7,326 acres set apart to P. De Cordova includes all the improved and cultivated land on said grant and the improvements thereon belonging to your orators and are the best lands in said grant, while the land set apart to your orators lies largely in the Trinity river bottom, subject to overflow, and

is in Anderson county, Texas, and remote from railway
7 transportation. Said partition was unequal, unjust, and inequitable.

Your orators further show that about 10,000 acres of the Riondo grant have been sold or compromised and about 10,000 acres have been lost by prescription and under junior locations, leaving about 28,708 acres belonging to your orators. One-sixth of this amount would be 4,784 acres, the utmost amount that P. De Cordova could claim under the contract of Feb. 26, 1852, if said instrument is to be construed to be a deed and to include lands on said grant not in controversy and not necessary to be compromised with anybody. Your orators charge and allege that said contract applied only to those lands secured to them by compromise or survey, and not to the entire grant, and they further charge that no land has been secured to them in the manner provided in said contract by J. De Cordova and P. De Cordova, or by either, which has not been fully paid to said De Cordovas, as shown by the instrument of May 7, 1860, hereinbefore mentioned, and at the date of the institution of the suit in Freestone county, Texas, your orators did not owe P. De Cordova either money or any land whatever by virtue of the contract of 1852.

The ancestor of your orators, J. W. Zacharie, so understanding and construing the contract of 1852 and the instrument of May 7th, 1860, on Aug. 19, 1865, sold the unsold balance of said Riondo grant to one Joseph Smolenski, estimating the number of acres so undisposed of at from 27,000 to 30,000, for which Smolenski agreed to pay $15,000 and gave his note for $3,000, payable May 1st, 1866, and twelve notes of $1,000 each, payable yearly thereafter, with 8 % interest per annum from May 1st, 1866. In the deed made by J. W. Zacharie to J. Smolenski it is provided that the vendor retains a lien on the land sold to secure the payment of said notes, and it further provides that if any of said notes remain unpaid for six months after due the vendor shall have the right, *ipso facto*, to cancel and annul the sale and re-enter and take possession of said lands, and Smolenski bound himself not to sell, transfer, or convey said lands so as to impair the lien and security of the vendor. The notes of Smolenski, though due for twenty or thirty years past, have never been paid, and your orators have possession of them and will produce same on the trial hereof; but said deed to Smolenski has been placed on record in Freestone, and perhaps Anderson county, also, in the State of Texas, and casts a cloud upon your orators' title.

And your orators further represent that all of said doings and performances have been and are in disregard of your orators'
8 legal and equitable rights in the premises and in gross fraud thereof, and to the great injury and detriment of your orators' rights.

Your orators represent that the lands described in this bill are of the value of $2.60 per acre, and the value of all of said lands is $21,100.

Your orators further represent that they are not advised whether any more of the land set apart, as aforesaid, to P. De Cordova has

been conveyed to and stands in the name of W. R. Boyd or not; but if it should prove to be true that P. De Cordova has conveyed any of said land set apart to him to W. R. Boyd, they pray that said deeds or conveyances may be cancelled, annulled, and set aside, as also the deeds from Boyd to Hill, Robertson, Parker, and McAdams; and they pray that the judgment of the district court of Freestone county, Texas, before described in this bill, may be set aside and held for nought, and that they may have a writ of restitution, assistance, or of possession for the lands described herein, and for all costs of suit, &c. They pray that the deed made by J. W. Zacharie to Joseph Smolenski may be set aside, cancelled, and the cloud thereby cast on your orators' title to said lands be removed, and they pray for such other relief, general and special, as may be consistent with equity and good conscience.

Your orators pray that subpœnas may issue to the respondents P. De Cordova and W. R. Boyd and Joseph Smolenski, and F. E. Hill, Charles Robertson, J. M. Parker, and George W. McAdams, commanding them, at a certain day and under a certain pain therein to be specified, personally to be and appear before your honor to answer this bill and to do and perform such order or decrees therein as to your honor may seem agreeable to equity and good conscience; and your orators will ever pray.

FARRAR, WILLIAM & FARRAR,
Solicitor for Complainants.

THE STATE OF LOUISIANA, }
Parish of Orleans. }

On this the 4th day of July, 1898, before me personally appeared Col. Frank C. Zacharie, on his own behalf and in behalf of the other complainants mentioned in this bill, and makes oath that he has read the above bill and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated to be on his information or belief, and that as to those matters he believes it to be true.

F. C. ZACHARIE.

9 Sworn to and subscribed before me this 4th day of July, 1898.

[SEAL.] GEO. W. MONTGOMERY, *Not. Pub.*

The foregoing has the following endorsement, to wit: No. 487. Eq. Amerlia L. Howard *et al. vs.* P. De Cordova *et al.* Original bill in equity. Filed July 7, 1898. J. H. Finks, clerk, vs. Chas. H. Lednum, deputy.

10 EXHIBIT "A."

Plaintiff's Original Petition.

In District Court of said County, Feb'y Term, 1896.

THE STATE OF TEXAS, }
County of Freestone. }

To the hon. judge of said court:

P. De Cordova, a resident citizen of Travis county, Texas, plaintiff, complaining of the unknown heirs of J. W. Zachary, deceased, and of Joseph Smolerski, would respectfully represent unto the court that the said J. W. Zachary is long since dead; that his heirs are unknown to plaintiff; that the residence of def't Joseph Smolerski is unknown to plaintiff; that plaintiff is the legal owner in fee-simple of an equal undivided one (1/6) sixth interest in the hereinafter-described land, and is entitled to partition and division of same; that the said unknown heirs of J. W. Zachary and the said Joseph Smolerski are entitled to the remaining 5/6 of said land; said land is described as follows:

Situate in Freestone and Anderson counties, State of Texas, and being eleven leagues granted to Manuel Riondo by the Mexican government on Nov. 26th, 1833:

Beginning at the N. W. cor. of the eleven leagues granted to J. N. Aquilera, a stake for cor.,

Thence N. 45 W. 7,500 vrs., a stake;

Thence N. 45 E. 40,000 vrs., crossing the Trinity river, to a stake;

Thence S. 45 E. 7,500 vs. to a stake in the north line of J. N. Aquilera grant;

Thence S. 45 W., with the north line of the said Aquilera grant, 40,000 vs., crossing the Trinity river, to the place of beginning.

Plaintiff would show that defendant Joseph Smolerski has some interest in said land as grantee of said J. W. Zachary, dec'd, as will appear by reference to the records of deeds of Freestone county, Texas, which would be a cloud and is a cloud upon plaintiff's title.

Plaintiff further represents that said J. W. Zachary, the ancestor of said unknown heirs, defendants, in his lifetime sold and conveyed many small tracts, parts of the above-described 11 leagues of land, and received the purchase-moneys therefor, to the entire exclusion of plaintiff, all of which said moneys were appropriated by said J. W. Zachary; that this plaintiff has conveyed about 800 acres of said land and received the purchase-money therefor and appropriated the same, all of which will appear by reference to the deed records of said Freestone and Anderson counties.

Wherefore, premises considered, plaintiff prays for citation by publication in terms of the law; that upon a hearing hereof
11 that plaintiff *plaintiff* have judgment against all the defendants for his equal one-sixth interest in said 11 leagues of land; that he have judgment for partition of same; that commis-

sioners be appointed to divide said land in accordance with the interest of the parties as herein set forth; that they be instructed to set apart to plaintiff an equal one (⅙) sixth of all of said lands, taking into account and setting apart to him all the lands which may appear to have been by him conveyed as aforesaid.

That they set apart to the said unknown heirs of J. W. Zachary, dec'd, (⅚ths) five sixths of all of said lands, taking into account and charging and setting apart to said heirs all the lands so sold and conveyed by said J. W. Zachary, as aforesaid; that the *could* cast upon plaintiff's title by reason of the conveyance to said Joseph Smolerski by J. W. Zachary, dec'd, be removed from such part of said land as may be set apart to plaintiff in partition, and that his, said Smolerski'-, interest, if any he have, be decreed and set apart with said unknown heirs, to be by them hereafter determined, and for such other and further relief, both general and special, as plaintiff may show himself to be entitled in the premises; and, in duty bound, he will ever pray.

W. R. BOYD,
Att'y for Pl'ff.

THE STATE OF TEXAS, }
County of Freestone. }

Before me, J. M. Taylor, clerk of the district court in and for Freestone county, Texas, this day personally appeared W. R. Boyd, att'y for pl'ff P. De Cordova, who, being by me duly sworn, says upon his oath that the residence of Joseph Smolerski is to him unknown; that the names of the heirs of J. W. Zachary *is* to him unknown.

W. R. BOYD,
Att'y for Pl'ff.

Subscribed and sworn to before me this 9th day of Nov., 1895.
J. M. TAYLOR,
Clerk D. C., F. Co., Tex.

THE STATE OF TEXAS, }
County of Freestone. }

I, J. B. Robertson, clerk of the district court in and for Freestone county, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original affidavit now on file in my office.

Given under my hand and seal of said court, at office, in
12 Fairfield, this 30th day of June, A. D. 1898.

[SEAL.] J. B. ROBERTSON,
Clerk Dist. Ct., F. Co., Tex.

The State of Texas to the sheriff or any constable of Freestone Co., Greeting:

You are hereby commanded to summon Joseph Smolerski and the unknown heirs of J. W. Zachary, deceased, by making publication of this citation once in each week for eight successive weeks

previous to the return day hereof in some newspaper published in your county, if there be a newspaper published therein, but if not, then in any newspaper published in the 13th judicial district; but if there be no newspaper published in said judicial district, then in a newspaper published in the nearest district to said 13th judicial district, to appear at the next regular term of the district court of Freestone county, to be holden at the court-house thereof, in Fairfield, on the 5th Monday after the 1st Monday in Jan'y, A. D. 1896, the same being the 10th day of Feb'y, A. D. 1896, then and there to answer a petition filed in said court on the 9th day of Nov'r, A. D. 1895, in a suit numbered on the docket of said court No. 1960, wherein P. De Cordova is plaintiff and Joseph Smolerski and the unknown heirs of J. W. Zachary, deceased, are defendants, and said petition alleging that plaintiff resides in Travis county, Texas; that the residence of defendant Smolerski is unknown; that the other defendants are unknown; that plaintiff P. De Cordova is the owner in fee-simple of an equal undivided one ($\frac{1}{6}$) sixth interest in eleven leagues of land situate in Anderson and Freestone counties, Texas, granted to Manuel Riondo by the Mexican government on Nov. 26th, 1833; that defendants are the owners of the remaining $\frac{5}{6}$ths of said land; that plaintiff is entitled to partition of said land. Said land is described as follows:

Beginning at the N. W. cor. of the eleven league- granted to J. Y. Aguilera, a stake for cor.,

Thence N. 45 W. 7,500 vs., a stake;

Thence N. 45 E. 40,000 vs., crossing the Trinity river to a stake;

Thence S. 45 E. 7,500 vs. to a stake in the north line of J. Y. Aguilera grant;

Thence S. 45 W. with the north line of said Aguilera grant 40,000 vs., crossing the Trinity river, to the beginning.

Pl'ff further represents that the said J. W. Zachary, deceased, defendant's ancestor, in his lifetime sold and conveyed various tracts of said Riondo grant and received the purchase-money therefor; that plaintiff has also conveyed a part of said Riondo grant and received the purchase-money therefor; that said defendant, Smolerski, owns some interest in said land as the grantee of said J. W. Zachary, deceased. Plaintiff prays judgment for his $\frac{1}{6}$ interest in said land and for partition, for commissioners to divide said land, and that said commissioners divide same according to quantity and quality, setting apart to plaintiff and charging him with all of said lands that may appear to said commissioners as having been sold and conveyed by him, and setting apart to defendants the $\frac{5}{6}$ths of said land, charging them with all of said lands that may appear to have been conveyed by their ancestor, said J. W. Zachary, deceased, and that said Smolerski's interest, if any he have, be decreed, together with said unknown heirs of J. W. Zachary, and that the deed to said Smolerski be cancelled in so far as the same may in any way affect the titles to said lands that may be set apart to plaintiff as a cloud upon his title, and for general relief.

13

Herein fail not, but have before said court, at its aforesaid next

regular term, this writ, with your return thereon showing how you have executed the same.

Witness J. M. Taylor, clerk of the district court of Freestone county.

Given under my hand and the seal of said court, at office, in Fairfield, this the 13th day of Nov'r, A. D. 1895.

J. M. TAYLOR,

[SEAL.] *Clerk District Court, Freestone Co., Texas.*

Sheriff's Return.

Came to hand on the 13th day of Nov., A. D. 1895, at 10 o'clock a. m., and I executed the within citation by publishing the same in the Wortham Vindicator, a newspaper published in the county of Freestone, once in each week for eight successive weeks previous to the return day hereof. Said publication was made respectively on the 22nd, 29th of Nov., 6th, 13th, 20th, and 27th days of Dec., and 3rd and 10th days of Jan., A. D. 1896, and a printed copy thereof is herewith returned.

J. N. HAYDEN,
Sheriff Freestone County.

The foregoing is endorsed: No. 1960. In district court. P. De Cordova *vs.* Joseph Smolerski and The Unknown Heirs of J. W. Zachary, dec'd. Citation by publication. Issued this 13th day of Nov., A. D. 1895. J. M. Taylor, clerk.

11

P. DE CORDOVA
vs.
JOSEPH SMOLERSKI ET AL. } # 1960.

SEPTEMBER 8TH, 1896.

This day this cause was called for trial, and it appearing to the court that this was a suit against Joseph Smolerski, whose residence is unknown, and The Unknown Heirs of J. W. Zacharie, deceased, and that service had been had by publication in the manner and for the time required by law, R. L. Williford, Esq., was appointed by the court to represent the said defendants, Joseph Smolerski and the said Unknown Heirs of J. W. Zacharie, dec'd.

Defendants' General Denial.

THE STATE OF TEXAS, }
County of Freestone. }

District Court, September Term, A. D. 1896.

To the district court of said county:

And now come the defendants, by attorney, and deny all and singular the allegations in plaintiff's petition; and of this they put themselves upon the country.

Wherefore they pray judgment, and that they be dismissed with their costs; and, in duty bound, they will ever pray, etc.

R. L. WILLIFORD,
Att'y for Defendants.

Agreed Testimony.

In District Court, Freestone County, Texas, Sept. Term, 1896.

P. DE CORDOVA
vs.
JOSEPH SMOLERSKI AND THE UNKNOWN HEIRS OF J. W. Zachary, Dec'd. } # 1960.

Be it remembered that upon the trial of the above entitled and numbered cause the following testimony was introduced by plaintiff, to wit:

1st. It is admitted that the land in controversy was titled to Manuel Riondo.

Pl'ff then introduced the following records:

1st. Deed or act of sale from Manuel Riondo to Wm. Moore; date, June 4th, '39; recorded in vol. S, page 56, deed records of Freestone Co., Tex., conveying 11 leagues of land granted to Manuel Riondo.

2nd. Deed or act of sale from Wm. Moore to J. W. Zachary; date, June 12th, 1841; recorded in vol. S, page 53, deed records of Freestone county, Texas; conveys Manuel Riondo 11-league grant.

3rd. Deed or transfer from J. W. Zachary to Jacob De Cordova & Phineas De Cordova; date, Feb. 26th, 1852; recorded in vol. H 1, page 557, deed records of Freestone county, Tex.; conveys an undivided ⅓rd interest in 11 leagues granted to Manuel Riondo.

4th. J. W. Zacharie & wife, C. E. Zacharie, to Joseph Smolerski, deed dated August 19th, 1865; recorded in vol. H 1, page 609, deed records of Freestone Co., Texas; conveys 27,000 acres, or the unsold interest of J. W. Zacharie in the Manuel Riondo 11-league grant.

5th. J. De Cordova to J. W. Zacharie, receipt and relinquishment of all his interest in M. Riondo 11-league grant; date, May 7th, 1860; recorded in vol. H 1, page 579, deed records of Freestone Co., Texas.

It is agreed that the above is the evidence or testimony introduced upon the trial of said cause.

W. R. BOYD,
Att'y for Pl'ff.
R. L. WILLIFORD,
Att'y for Def'ts.

Approved:
RUFUS HARDY,
Judge 13th Jud. Dist.

Report of Commissioners.

In District Court of Freestone County, Texas, September Term, 1896.

P. De Cordova
vs.
Joseph Smolerski and The Unknown Heirs of J. W. Zacharie, Deceased. } #1960.

To the hon. district court of said county:

We, the undersigned commissioners, who were appointed by this court on the 8th day of Sept., 1896, to make a partition and division of the Manuel Riondo eleven-league grant of land, as set forth and described in the decree of this court entered in the above styled and numbered cause on the 8th day of Sept., 1896, a copy of which was furnished us by the clerk of this court, beg leave to make the following report, to wit:

We first viewed said lands, and upon information furnished by the deed records of Freestone and Anderson counties we find that the plaintiff, P. De Cordova, has heretofore conveyed by deed of conveyance only one tract, supposed to contain 792 acres, sold by said plaintiff to W. R. Boyd. Said tract is described as follows:

Beginning at the S. W. cor. of the A. Webb tract in J. Korn league line, a B. J. 10 in. dia. brs. S. 37½ E. 3 vrs.,

16 Thence east with Webb's S. line 1,150 vs., his S. E. cor., a B. J. 6 in. dia. brs. S. 52 W. 3 vrs., a do. 12 in. brs. N. 46 W. 6 vrs.;

Thence north with Webb's east line 483 vs., a stake;

Thence east 840 vs., a stake;

Thence S. 1,075 vs., a stake in A. P. Vaughan's N. line, a B. J. 10 in. brs. N. 18 E. 13 vrs., a do. 3 in. dia. brs. N. 10 W. 5½ vs.;

Thence west 350 vrs., a stake, a B. J. 14 in. dia. brs. S. 55 E. 3¾ vs., a do. 12 in. brs. N. 67 W. 11 vs.;

Thence S. 334 vs., a stake, a B. J. 10 in. brs. S. 83 W. 9 vs., being James' N. E. cor.;

Thence west, at 776 vs. N. E. cor. of Wm. Gardner's survey, at 1,677 vs. to a point where said Gardner survey crosses M. Riondo's 11-league line;

Thence N. 35 W. with said 11-league line 2,832 vs., a stake;

Thence east with the Childs tract 1,775 vs. to Childs' S. E. cor., a stake in A. Webb's west line, a P. O. 16 in. dia. brs. N. 45 W. 3 vrs., a P. O. 15 in. brs. S. 53 W. 6 vrs.;

Thence south 1,490 vs. to the beginning;

And this being the only tract or part of said eleven leagues heretofore conveyed by plaintiff, we therefore charge him with said tract and first set apart same to plaintiff De Cordova; and upon further investigation we found that the said J. W. Zacharie in his lifetime conveyed various and sundry tracts, lots, and parcels of said land not necessary to be described in this report, as we charge the de-

fendants with all of said tracts so conveyed by the said J. W. Zacharie, deceased.

And we further find that after full investigation and careful consideration of the matters in hand we have surveyed and set apart to the plaintiff P. De Cordova out of the unsold balance of said eleven leagues the following-described tract of land, to wit, all situate in Freestone county, Texas:

Beginning on the west bank of Trinity river, on the S. B. line of Manuel Riondo'- 11-league grant,

Thence up said river with its various meanders to M. Hunte's S. E. cor., which is a hackberry 8 in. dia. for cor., and a hackberry brs. N. 40 E. 3 vs.;

Thence S. 59 W. 2,744 vs., stake, B. J. 7 in. brs. S. 40 E. 4 vs., B. J. 8 in. N. 74½ E. 12 vrs.;

Thence N. 31 W. 1,480 vs. red oak 15 in. brs. N. 68 W. 3 vs., hickory 6 in. brs. N. 60 E. ½ vr.;

Thence S. 60 W. 950 vs., stake, B. J. 10 in. brs. N. 60 E. 19 vs., P. O. 12 in. S. 51 E. 26½ vs.;

Thence N. 30 W. 798 vs., stake, hickory 9 in. brs. N. 3 W. — vs., hickory 10 in. N. 82½ E. 7 vrs.;

Thence S. 60 W. 908 vs., B. J. 8 in. for corner;

Thence S. 30 E. 2,572 vs., stake;

Thence S. 60 W. 1,062 vs., stake;

Thence N. 30 W. 1,062 vs., stake on Hiram Lott's S. line;

Thence S. 60 W. 255 vs, S. W. cor. of Lott's, a hickory 8 in. brs. N. 78 E. 3 vrs., a hackberry 3 in. brs. N. 16 E. $2\frac{8}{10}$ vs.;

Thence N. 30 W. 1,200 vs., stake, hickory 12 in. brs. N. 79 E. 2 vs., B. J. 15 in. brs. S. 7½ E. 7 vs.;

Thence S. 60 W. 760 vs., stake in Geo. Jones' E. line;

Thence S. 30 E. 136 vs., stake, B. J. 14 in. brs. S. 45 E. 7 vs., P. O. 10 in. brs. S. 32 E. 10 vrs.;

Thence S. 60 W. 839 vs., stake, the N. E. cor. of W. L. Edwards Jr.'- 150-acre tract;

Thence S. 30 E. 1,200 vs., Edwards' S. E. cor.;

Thence S. 60 W. 705 vs., Edwards' S. E. cor. of 150 acres;

Thence N. 30 W. 248 vs., stake;

Thence S. 60 W. 752 vs., stake, S. W. cor. of Edwards' 100 acres;

Thence N. 30 W. 1,800 vs., stake;

Thence S. 55 W. 3,797 vs., stake;

Thence S. 35 E. 4,931 vs., stake on S. B. line of 11 leagues;

Thence N. 55 E. 9,763 vs., stake in W. line of Hugh Henderson's 640-acres survey;

17 Thence N. 31 W. 723 vs., stake in field;

Thence N. 59 E. 1,900 vs., stake in Henderson's E. B. line;

Thence S. 31 E. 590 vs., stake in 11-league line;

Thence N. 55 E. 1,274 vs. to stake on river bank, the beginning, containing 7,326 acres.

And to the defendants Joseph Smolerski and The Unknown Heirs of J. W. Zacharie, deceased, we set apart all the remaining portion of said eleven leagues in both Freestone and Anderson counties, after deducting and taking therefrom the above-described tract, and

that without prejudice to the defendants, as between said Smolerski and said Unknown Heirs of J. W. Zacharie, deceased. As ordered by the court, a plot of said lands is hereto attached, showing the lands set apart to plaintiff, and is made a part of this report.

This Sept. 26th, 1896.

T. G. BLACKMON,
SANFORD IVY,
Comm'rs.

THE STATE OF TEXAS, }
County of Freestone. }

Before me, J. M. Taylor, clerk of the district court in and for Freestone county, Texas, on this day personally appeared T. G. Blackmon, Sanford Ivy, and Will Powers, commissioners, whose names appear signed to the foregoing report, who, after being by me duly sworn, upon their oath say that the above is a correct report; that same is in their opinion just, fair, and equitable as between the parties, and that in making same they had due consideration as to quantity and quality of said land.

Subscribed and sworn to before — Sept. 26, 1896.

J. M. TAYLOR,
Clerk Dist. Ct., Freestone Co., Tex.

Decree Confirming Report, &c.

P. DE CORDOVA
vs.
JOSEPH SMOLERSKI AND THE UNKNOWN HEIRS OF J. W. ZACHARIE, DECEASED. } # 1960.

SEPTEMBER 28TH, 1896.

This day this cause came on to be heard upon the report of the commissioners heretofore, on Sept. 8th, 1896, appointed to make partition of the lands described in the decree of this court entered in this cause on said 8th day of Sept., 1896, said report having been filed in this court on the 26th day of Sept., 1896, and it appearing to the court that said report had been on file for more than
18 one entire day, and that no objection is made to same, said report was examined by the court and in all things approved and confirmed, and is ordered to be recorded as a part of this decree. Said report is in words and figures substantially as follows:

(Here attach report.)

It is therefore considered and ordered, adjudged, and decreed by the court that all the right, title, and interest of the defendants Joseph Smolerski and of The Unknown Heirs of J. W. Zacharie, deceased, in and to the two tracts of land above mentioned in said report, to wit, 792 acres and 7,326 acres, as set apart by the said commissioners to pl'ff, P. De Cordova, be, and the same is hereby, divested out of the said Joseph Smolerski and the said Unknown Heirs of J. W. Zacharie, dec'd, and is hereby vested in plaintiff, P. De Cordova.

That all the right, title, and interest of the plaintiff, P. De Cordova, in and to the remainder of said 11 leagues of land as set apart by said commissioners be, and the same is hereby, divested out of plaintiff, P. De Cordova, and is vested in defendants Joseph Smolerski and the said Unknown Heirs of J. W. Zacharie, deceased, without prejudice to either as between said defendants, and that plaintiff pay all costs of this suit, including a fee of $25.00 to be paid R. L. Williford, Esq., as attorney, for representing def'ts served by publication, to be taxed in the bill of costs in this suit.

THE STATE OF TEXAS, }
County of Freestone. }

I, J. B. Robertson, clerk of the district court in and for Freestone county, State of Texas, do hereby certify the within and foregoing to contain a true and correct copy of certain original papers now on file in my office in cause No. 1960, wherein P. De Cordova is plaintiff and Joseph Smolerski *et al.* are defendants.

Witness my hand and the seal of said court, at office, in Fairfield, Texas, this 18th day of June, A. D. 1898.

J. B. ROBERTSON,
[SEAL.] *Clerk Dist. Ct., F. Co., Texas.*

19 EXHIBIT "B."

FAIRFIELD, TEXAS, *May 16th*, 1892.

Mr. James S. Zacharie, New Orleans, La.

MY DEAR SIR: I wrote you some months since with regard to a certain suit pending in our dist. court, in which I represent the def'ts, who are in possession. The legal title to the land in controversy is in the h'rs of J. W. Zacharie, and the plaintiffs are seeking to foreclose a vendor's lien against def'ts for 320 a. of land. I succeeded in getting pl'ff to agree that he would divide the judgment or proceeds with Zacharie heirs if they will come in and make title.

I am very desirous of getting title in my clients, and if you can make deed will be pleased to arrange with you to buy up the title of Zacharie heirs before Sept. 1st, as the case will come on for trial then. The def'ts (my clients) refuse to pay pl'ff because he cannot make title; still, if some understanding cannot be had with the h'rs and my clients, they cannot under the law plead your title, because not connected with it. I have several matters that I wish to have corrected in the lands formerly sold by your father, and I had understood from L. J. Farrar, of Groesbeck, Tex., that you would be here in March or April. I, however, had a letter from him some days since, in which he states that he had heard nothing further from you.

I am not advised as to what my clients will pay for deed from the h'rs, but will pay you liberally for it. Most of Zacharie's heirs are barred by limitations, as to my clients anyway; still they are willing to pay for the land if title can be had.

Please write me at once what you can do in the premises and when you can be out, if at all, &c., &c.

As I wrote you before, should this case go to trial you will probably lose your interest in the land, as plaintiff will hold by limitation.

Yours very truly, W. R. BOYD.

P. S.—If you have no ag't here, would like to place your lands on my list.

B.

20 EXHIBIT "C."

Collections and Disbursements on ⅝ of the Rioudo Grant by J. De Cordova.

Collected on ⅝ of	G. F. Shelton's	note of	$176.50			$100.
	James Harrald's	" "	110.00, one mule, $65, sold for			50.
	W. Allbright's	" "	194.75			100.
Collected	W. W. Guinn's	" "	21.62, interest,		2.62	24.24
	Bird Wolverton's	" "	66.00,	do.	7.70	73.70
	Thos. Wolverton,	" "	80.00,	do.	8.	88.
	J. Wolverton, Jr.,	" "	103.60,			
			361.00,	do.	54.86	519.46
	C. D. Holloman's	" "	48.12,	do.	4.62	52.74
	J. Wolverton, Sen.,	" "	80.00,	do.	10.24	90.24
						$1,098.38

Disbursements.

Paid for recording		24.58	
" " "		10.00	
" for taxes for 1853	11.25		
1854	11.25		
1855	11.25		
1856	11.25		
		45.	
			79.58
			$1,018.80

Amount due J. W. Zacharie, ⅔ $679.20
J. De Cordova, commissioner, ⅓ 339.60

E. E.
E. & O. E.
Jan'y 26th, 1857.

J. DE CORDOVA.

Amount of Notes Due Dec. 25, 1855, Collected by De Cordova & Frazier for ⅝ J. W. Zacharie, of N. O.

Names.	Principal.	Interest from Sept. 14 to Dec. 25.	Amount.
Bird Wolverton	18.00	.50	18.50
John Wolverton, Jr	261.	7.32	268.32
John Wolverton, Sen	50.	1.40	51.40
Thos. Wolverton	50.	1.40	51.40
G. F. Shelton	126.50	3.55	130.05
G. F. Shelton	70.	1.97	71.97
Wiley Colwell	76.75	2.17	78.92
W. W. Hanks	50.	1.40	51.40
W. W. Guinn	11.62	.32	11.94
	$713.87	20.03	$733.90

Amount due J. W. Zacharie, ⅔ 489.27
J. De Cordova, commissioners, ⅓ 244.63

E. & O. E.

I. DE CORDOVA.

	Paid in Washington, Panot's testimony		10.00
21	Do. Thos. Hale for original titles		500.00
	cash % sales No. 1, $617		411.33
	do. 2, 612.19		408.13
	collections % notes due Dec., '55, No. 3, 733.90		489.27
	" " " '56, No. 4, 1,018.80		679.20
1855.			
Nov. 28.	Paid him bal. of d'ft £100 at 6 %	471.11	
	Less	408.13	
			63.11
	Which is ch'ged, as the d'ft was protested		47.55
	Damages on protested draft, 10 %		
			$2,608.59
1859.			
Feb. 28.	Balance to his debit		315.62
	Unaccounted for and due with interest, No. 6:		
	% sale No. 1, due Dec. 25, '55, Fitzgerald & Harding	70.00	
	% sale No. 1, due Sept. 17, 1856:		
	No. 1, Goads & Hudson	76.66	
	No. 2, G. F. Shelton	80.00	
	No. 5, W. W. Hanks	61.25	
	No. 6, Fitzgerald & Hardon	80.00	
	No. 9, Willey Calwell	96.75	
	No. 10, W. C. Daniels	670.00	
	No. 11, G. F. Shelton	76.50	1,141.16
	% sale No. 1, due Sept. 17, '57:		
	No. 1 to 13, as per list		1,982.04
	% sale No. 1, due Sep. 17, '58:		
	No. 127, as per list		230.54
	% sale No. 2, due Sep. 14, '56:		
	R. M. Tyas	285.25	
	Albright & wife	94.75	
	J. W. Blackburn	60.85	
	Jas. Harrold	45.00	
	John Jackson	32.44	
	L. S. Townsend	75.00	
	E. Hobbs	35.00	
	L. B. Hayes	80.00	708.25
	% sale No. 2, due Sep. 14, '57, as per list		1,024.98
	% sale No. 2, due Ap'l 15, '56		185.25
	%		356.48

Cr.

	By proceeds of d'ft £250		1,188.88
	D'ft on New York		353.97
	Durand's note	651.25	
	10 % interest	65.12	716.37
	Ancar taxes, as per his % Jan. 26, '57		33.75
	Balance from W. L.		315.62
1859.			
Apr-l 21.	D'ft on Ham	200.00	
	Check Union bank	400.00	
May 24.	Cash from W. P. Normandie, 1½ % 300	304.50	904.50
			2,972.60
	Balance		

22 *Complainants' Amended Bill.*

Filed January 10th, 1899.

AMELIA L. HOWARD ET AL.
vs.
P. DE CORDOVA.
} No. 487. In Equity.

To the hon. the judges of the circuit court of the United States for the northern district of Texas, at Dallas:

Now come your orators, by leave of this hon. court first had and obtained, and amend their original bill filed herein on July 7th, 1898, in which they seek to recover against the respondents P. De Cordova and W. F. Boyd, F. E. Hill, Charles Robertson, J. M. Parker, and George W. McAdams the land described in the original bill and the removal of a cloud upon your orators' title to said land held by one Joseph Smolenski, and, in pursuance of the order granting leave to amend said original bill, respectfully allege that in the suit referred to in said original bill filed by P. De Cordova, through his attorney, W. R. Boyd, service was obtained by publication upon your orators, not by name, but upon them as the unknown heirs of J. W. Zacharie, dec'd, in the Wortham Vindicator, a newspaper published in the extreme northwestern part of Freestone county, when there was a newspaper published at Fairfield, the county-seat of Freestone county, Texas, called the Fairfield Recorder, and the land described in the original bill is situated in the extreme S. E. corner of Freestone county, Texas, and at the probable distance of 35 or 40 miles from the town of Wortham, where the Wortham Vindicator is published. Communication between the people in the southeastern part of the county and the northwestern part of the county of Freestone is infrequent, and the point of publication of said citation against the unknown heirs of J. W. Zacharie was well calculated to withhold the information from your orators and their agent, who resided near said lands; that said suit had been filed and was pending in said district court of Freestone county, Texas, and did have this effect. Your orators had a local agent in Freestone county, living near said lands and looking after the same, and it was not until long after final judgment in said suit in Freestone county, Texas, that your orators heard of said suit or its results.

Your orators further allege that, in pursuance of the design
23 on the part of P. De Cordova to obtain an unjust judgment against your orators, he alleges in his original petition filed in said suit in the district court of Freestone county, Texas, No. 1960, that "he is the legal owner in fee-simple and of an equal undivided one-sixth interest in the hereinafter-described land, and is entitled to partition and division of same," which will appear by reference to the transcript in said cause 1960, made an exhibit and marked "A" in said original bill. This allegation of the petition in said cause No. 1960 is incorrect and in point of fact untrue, as will more fully appear by an inspection of the duplicate original contract made between J. W. Zacharie, dec'd, the ancestor of your orators, and the

said P. De Cordova and J. De Cordova, said contract being dated the 26th day of February, 1852, which is hereto annexed and made a part of this amendment and marked Exhibit " F," said duplicate original being duly acknowledged by all the parties thereto before Francis T. Duffau, a notary public of Travis county, Texas, and there is endorsed upon said duplicate original by Robert Murray, clerk of Freestone county, Texas, these words: "Another copy recorded at Fairfield, Freestone county, Texas, February 20th, 1864, at 10 o'clock a. m."

Your orators further show that when service by publication in Texas is obtained upon unknown heirs the statutes of said State require, in addition to the appointment of an attorney to represent said unknown heirs, that a statement of facts shall be made out and filed by the attorneys of record, showing the evidence upon which the judgment is rendered; and your orators show that in pursuance of the purpose to obtain an unjust and inequitable judgment against your orators in said cause in the district court of Freestone county, Texas, and without evidence to support it, W. R. Boyd, attorney for P. De Cordova and R. L. Williford, Esq., who was appointed by the hon. district court of Freestone county to represent the unknown heirs of J. W. Zacharie in said cause in their statement of the facts proven on the trial in the 3rd finding or agreement, say: " Deed or transfer from J. W. Zacharie to Jacob De Cordova & Phineas De Cordova, dated Feb. 26th, 1852; recorded in vol. H 1, page 557, deed records of Freestone county, Texas; conveys an undivided $\frac{1}{3}$ interest in 11 leagues granted to Manuel Riondo," as will appear by reference to Exhibit "A" of the original bill.

Your orators show that this finding or agreement last above quoted is based upon the instrument annexed to this amendment and heretofore styled Exhibit " F," and said instrument con-
24 stituted the sole evidence of right to any portion of the land that plaintiff had at the time of the trial of said cause in the district court of Freestone Co., Texas.

Your orators respectfully show that while said statement of facts is approved by Hon. Rufus Hardy, judge of the 13th judicial district, yet they do not believe that said instrument of February 26th, 1852, was read in evidence to said judge or read by him, but that the statement was made to said judge of what said instrument was without its contents being read or made known to him, and that the said judge was imposed upon and deceived as to the contents of said instrument, and so signed said instrument of facts.

Your orators cannot state that the imposition upon the court above alleged as to the character of the instrument of February 26th, 1852, was practiced designedly or fraudulently, but, if such was not the character of said imposition, it was done by accident or mistake and is in fact no less a fraud upon your orators' rights in the premises than if it had been done with a fraudulent purpose and intent, and your orators charge that the judgment recovered in said cause 1960, in Freestone county, Texas, set out in Exhibit "A" in the original bill, was a fraud upon the rights of your orators and

resulted in divesting your orators of a portion of their lands upon the untrue allegations in the petition filed in the district court of Freestone county, Texas, and upon the untrue statement, before mentioned, in the statement of facts filed in said cause in reference to the said contract of Feb. 26th, 1852, wherein said contract is termed a deed and recites that it "conveys ½ undivided interest in the Manuel Riondo 11-league grant."

Your orators further show that J. W. Zacharie's covenant to make title, set out in Exhibit "F," attached to this amendment, is a covenant to J. De Cordova and Phineas De Cordova jointly; that on the trial of this cause above mentioned in the district court of Freestone county, Texas, the plaintiff therein, in order to show the extent of his interest in the contract of Feb. 26th, 1852, read in evidence or incorporated in the statement of facts an instrument signed by J. De Cordova and dated the 7th of May, 1860, and recorded in vol. H, page 579, deed records of Freestone county, Texas, styled in said statement a receipt and relinquishment of all his interest in M. Riondo 11-league grant. A true copy of this instrument is hereto attached and marked Exhibit "G." Your orators are advised and believe that J. De Cordova and Phineas De Cordova, being joint covenantees in the instrument of Feb. 26th, 1852, the
25 instrument of May 7th, 1860, was a complete satisfaction and re-cission of said instrument of Feb. 26th, 1852, and that after May 7th, 1860, the respondent P. De Cordova had no further interest in the contract of Feb. 26th, 1852, and they so charge.

Your orators further show that the commissioners appointed by the hon. district court to make partition between P. De Cordova and the unknown heirs of J. W. Zacharie did in their report charge the unknown heirs of J. W. Zacharie with all of the sales made of any part of the Riondo grant during the lifetime of the said J. W. Zacharie, as is shown by Exhibit "A" in the original bill, which action on the part of the commissioners operated as a fraud upon your orators' rights, though probably unknown to them, for the reason that Exhibit "E" of the original bill shows that J. De Cordova and P. De Cordova received their one-third of all such sales made during the lifetime of J. W. Zacharie down to May 7th, 1860, and the instrument of May 7th, 1860, shows the same fact, and if plaintiff in the suit in the district court of Freestone county, Texas, were under any circumstances entitled to partition and division of said Riondo grant, which they deny, the sales made on said grant during the lifetime of J. W. Zacharie should not have been charged exclusively to the defendants in said suit when the plaintiff in said suit and his co-covenantee, J. De Cordova, received their share of said sales in accordance with the terms of the contract of Feb. 26th, 1852. These facts must have been known to P. De Cordova, though they were probably unknown to W. R Boyd or any one else connected with the proceedings in said suit in Freestone county, Texas, and in the suppression of said fact by the respondent P. De Cordova your orators have been defrauded in the final judgment rendered in said cause, and they have been deprived by said judgment of their just rights.

Your orators further respectfully charge that by reason of the facts set out in the original bill of July 7th, 1898, and in this amendment the judgment of the district court of Freestone county, Texas, described in Exhibit "A" in the original bill, operated as a fraud upon the rights of your orators and divested them of their property, whether said judgment was procured with fraudulent intent or was procured by accident or mistake, and, without positive knowledge of the fact, they believe and charge that the hon. district judge who tried said cause 1960 in the district court of Freestone county, Texas, was imposed upon and deceived by the allegations of plaintiff's petition in said cause and by the statement of facts filed in
26 said cause as to the character of the instrument of February 26th, 1852, and was induced to render and did render a judgment that was unfair, unjust, and inequitable, depriving your orators of their property without cause; and they further charge that the suppression by plaintiff in said cause 1960 of the facts set forth more specifically in this amendment renders said judgment fraudulent as to your orators.

Your orators file herewith as exhibits to this amendment the deeds made after the date of the judgment in said cause No. 1960 by W. R. Boyd and another to F. E. Hill, Charles Robertson, J. M. Parker, and George W. McAdams, styled Exhibits H, I, J, K, & L, and deed of P. De Cordova to W. R. Boyd, marked Exhibit H 1. Your orators file herewith as exhibits to this amendment a copy of the deed made by J. W. Zacharie to Joseph Smolenski, styled Exhibit M, and the notes of Smolenski described in the original bill, the first of said series of notes for $3,000 being protested for nonpayment, said notes styled Exhibit N.

Your orators, as alleged in the original bill, were totally ignorant of the proceedings in said cause 1960 in the district court of Freestone (county), Texas, until long after final judgment therein, and they pray for the relief asked for in their original bill, or, if for any reason it is not such relief as your hon. court can grant, they pray that P. De Cordova and the other respondents who claim under him (except Smolenski) may not be permitted to enjoy the inequitable advantage obtained by the said P. De Cordova by reason of the judgment in said cause 1960, and that he and those claiming under him be deprived of the benefit of the judgment so obtained, and they pray, if necessary to carry out and effect this relief, that the respondents be required to reconvey all of said lands acquired by them under said judgment to your orators, or, in case of their failure to do so within a time to be fixed by this court, a commissioner be appointed, with power and authority to make said reconveyance, which shall have the same force and effect as a conveyance by the respondents, or that such relief may be granted as shall deprive said respondents of their title so, as aforesaid, unjustly obtained and vest in your orators all the right and title so acquired under said judgment; and they will ever pray.

FARRAR, WILLIAMS & FARRAR,
Att'ys & Solicitors for Complainants.

27 THE STATE OF LOUISIANA, }
Parish of Orleans. }

On this the 8th day of December, 1898, before me personally appeared Frank C. Zacharie, one of the complainants in the original bill, and on behalf of himself and the other complainants in said original bill and this amendment, and made oath that he has read the above and foregoing amendment and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated to be on his information or belief, and that as to those matters he believes it to be true.

F. C. ZACHARIE.

Sworn to and subscribed before me this 8th December, 1898, at New Orleans, La.

[SEAL.] GEO. MONTGOMERY, *Not. Pub.*

The foregoing has the following endorsement, to wit: No. 487. Eq. Amelia L. Howard *et al. vs.* P. De Cordova *et al.* Complainants' amended bill. Filed Jan'y 10, 1899. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

28 EXHIBIT "F."

STATE OF TEXAS, }
County of Travis. }

Articles of agreement between James W. Zacharie, of the city of New Orleans, of one part, and Jacob and Phineas De Cordova, of the county of Travis, of the other part.

Whereas, the party of the first part James W. Zacharie, Esq., is the just and lawful owner by regular chain of transfer of a certain tract or parcel of land known as the Manuel Riondo eleven-league grant supposed to be in Robertson district which said tract of land is not represented on the map of the district in the land office and sundry headrights, bounty and other land warrants of the late Republic now State of Texas have been located surveyed and patented to the detriment of said Zacharie.

Now the parties of the second part undertake to have the said grant placed on the map and under the power of attorney of same date as this agreement to compromise in the best possible manner or make sales of said land in all manner as will tend to the interest of said James W. Zacharie, Esq., free of all expense to him and the said James W. Zacharie in consideration of all these services and for the further amount of one dollar in hand paid doth covenant and agree to make a full title for one-third of all the lands which shall be secured with a clear title by compromise or survey and to allow the said De Cordova's one-third of all receipts made by sale of said lands by way of compromise it being specially understood that said Zacharie is not to be put to any expense whatever saving for such taxes as may be due thereon.

In witness whereof both parties have hereunto set their hands and seals (using scroll for seal) at the city of Austin, this 26th day of February, 1852.

J. W. ZACHARIE.
J. DE CORDOVA,
By His Attorney-in-fact, P. De Cordova.
P. DE CORDOVA.

THE STATE OF TEXAS, }
County of Travis. }

Personally came and appeared before me, the undersigned, a notary public in said county, James Weters Zacharie and P. De Cordova, as attorney-in-fact for Jacob De Cordova and for himself, who each severally acknowledged they had executed the above instrument for all the purposes and considerations therein expressed and contained.

29 Witness my hand and seal of office, at Austin, this the 26th day of Feb'y, 1852.

FRANCES T. DUFFAU,
[SEAL.] *Notary Public, Travis County.*

Received, Austin, February 26th, 1852, of James Waters Zacharie, Esq., the following papers, viz:

A certified copy in Spanish of the original testimonio of eleven league of land granted to Manuel Riondo, certified to by Thomas William Ward, Commissioner of the General Land Office, on the 28 March, 1846.

A plot of said grant.

A deed in Spanish from Manuel Riondo to Don Guillermo Moore.

A certified copy of the notarial deed executed by Moore to Zacharie.

JACOB & PHINEAS DE CORDOVA.

On the return of J. W. Zacharie to New Orleans I agree that his contract with me as regards the Riondo grant shall be submitted to James D. Denegre and Levi Hubble, and that the said parties shall decide upon the said contract without argument or verbal explanation of any sort if the said contract obligates J. De Cordova to pay the whole or any portion of the legal expenses in prosecuting this claim in the courts of Texas, or to pay for the amount expended for obtaining the original title from Mexico.

Galveston, May 7, 1860.

J. DE CORDOVA.

The foregoing is endorsed on the back thereof: Agreement with J. & P. De Cordova. Another copy recorded at Fairfield, Freestone Co., February 20, 1864, at 10 a. m., by Rob't Murray, clerk.

30 EXHIBIT "G."

No. 2. J. De Cordova to J. W. Zacharie. Recorded, B, fol. —, Anderson Co.

According to an acc't furnished by J. W. Zacharie, of New Orleans, it shows that I am largely in his debt; therefore, for and in consideration of the promises and two hundred and fifty dollars cash, to me in hand paid, I do hereby relinquish to the said J. W. Zacharie all my right, title, interest, and claim in and to the Riondo grant of eleven leagues, in any shape or form, and hereby declare that the said contract is this day cancelled and annulled.

Galveston, May 7th, 1860.

J. DE CORDOVA.

Filed Sept. 16, 1865.
J. H. WATTS,
Clk Co. Ct., A. Co.

EXHIBIT "H 1."

THE STATE OF TEXAS, }
County of Travis. }

Know all men by these presents that P. De Cordova, of the county of Travis, in the State aforesaid, for and in consideration of the sum of ten dollars, to me paid by W. R. Boyd—ten dollars cash, to me paid—the receipt whereof I hereby acknowledge, and for other considerations, have granted, sold, and conveyed, and by these presents do grant, sell, and convey unto the said W. R. Boyd, of the county of Freestone and State of Texas, all that certain tract or parcel of land lying and situate in Freestone county, Texas, and being a part of the Manuel Riondo 11-league grant:

Beginning at the S. W. corner of the A. Webb tract, a stake in J. Korn'- league line, a B. J. 10 in. dia. brs. S. 37½ E. 3 vrs.;

Thence E. with Webb's S. line 1,150 vrs., his S. E. corner, a B. J. 6 in. dia. brs. S. 52 W. 3 vrs., a do. 12 in. brs. N. 46 W. 6 vrs.;

Thence north, Webb's east line 483 vrs., a stake;

Thence east 840 vrs., a stake;

Thence south 1,075 vrs., a stake in A. P. Vaughn's N. line, a B. J. 10 in. dia. brs. N. 18 E. 13 vrs., a do. 3 in. brs. N. 10 W. 5½ vrs.;

Thence west 350 vrs., a stake, a B. J. 14 in. brs. S. 55 E. 3¾ vs., a do. 12 in. brs. N. 69 W. 11 vrs.;

Thence south 334 vrs., a stake, a B. J. 10 in. brs. S. 83 W. 9 vrs., being Jones' N. E. corner;

Thence west, at 776 vrs. N. E. corner of Wm. Gardner's survey, at 1,677 vrs. to a point where said Gardner survey crosses M. Riondo'-league line;

Thence N. 35 W. with said 11-league line 2,832 vrs., a stake;

Thence east with the Childs tract 1,775 vrs. to Childs' N. E. corner, a stake in A. Webb's west line, a P. O. 16 in. dia. brs. N. 45 W. 3 vrs., a P. O. 15 in. brs. S. 53 W. 6 vrs.;

Thence south 1,490 vrs. to the beginning, containing 792 acres, more or less.

31 To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said W. R. Boyd, his heirs and assigns, forever; and I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said W. R. Boyd, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness my hand, at Austin, this 2d day of July, A. D. 1895.

P. DE CORDOVA.

THE STATE OF TEXAS, }
County of Travis. }

Before me, S. D. De Cordova, a notary public in and for said county, Texas, on this day personally appeared P. De Cordova, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 2d day of July, 1895.

S. D. DE CORDOVA,
[SEAL.] *Notary Public, Travis Co., Tx.*

THE STATE OF TEXAS, }
County of Freestone. }

I, R. N. Compton, clerk of the county court of said county, do hereby certify that the foregoing instrument and its certificate of authentication was filed for record in my office this 4th day of July, A. D. 1895, at 8 o'clock a. m., and duly recorded the 8 day of July, 1895, at 10 o'clock a. m., in the records of said county, in volume 8, on pages 379 & '80.

Witness my hand and seal of office the day and year last above written.

[SEAL.] R. N. COMPTON, *Co. Clerk.*

THE STATE OF TEXAS, }
County of Freestone. }

I, C. B. Dunagan, clerk of the county court in and for said county, do hereby certify that the foregoing is a true and correct copy of a deed of record in my office, as shown in Book 8, pages 379 & 380, deed records of Freestone county, Texas.

Given under my hand and seal of office, in Fairfield, this 22 day of June, 1898.

C. B. DUNAGAN,
[SEAL.] *Clerk County* Clerk, *Freestone County, Texas.*

32 EXHIBIT "J."

THE STATE OF TEXAS, }
County of Freestone. }

Know all men by these presents that we, W. R. Boyd, T. R. Watson, and J. B. Watson, of the county of Freestone, in the State aforesaid, for and in consideration of the sum of one hundred and twenty ($120.00) dollars to us in hand paid as follows: one hundred and twenty dollars, cash to us in hand paid, the receipt of which is hereby acknowledged, have granted, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said F. E. Hill, of the county of Freestone, State of Texas, all that certain tract or parcel of land situated in Freestone county, Texas, and being a part of the Manuel Riondo eleven-league grant:

Beginning at a stake the N. E. corner of Chas. Robertson's 133-acre tract, a hickory 14 in. dia. brs. S. 60½ W. 3 vrs.,

Thence N. 255 6/10 vrs., a stake, from which a hickory 16 in. brs. N. 44 vrs.;

Thence west 880 vrs. to a stake, the S. W. cor. of the Roberts 100-acre tract, a B. J. 10 in. brs. S. 37½ E. 3 vrs.;

Thence south 255 6/10 vrs. stake, a B. J. brs. S. 60 E. 5 vrs., do. 10 in. brs. N. 62½ W. 3 vrs.;

Thence east 880 vrs. to the beginning, containing 40 acres.

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said F. E. Hill, his heirs and assigns forever; and we do hereby bind ourselves, heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said F. E. Hill, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands, at Fairfield, this 10th day of Dec., A. D. 1895.

W. R. BOYD.
T. R. WATSON.
J. B. WATSON.

THE STATE OF TEXAS, }
County of Freestone. }

Before me, R. N. Compton, clerk of the county court in and for Freestone county, Texas, on this day personally appeared W. R. Boyd, T. R. Watson, and J. B. Watson, all of whom are known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that *he* executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 13th day of Dec., A. D. 1895.

R. N. COMPTON,
[SEAL.] — *Co. Ct., F. Co., Tex.*

33 THE STATE OF TEXAS, }
County of Freestone. }

I, R. N. Compton, clerk of the county court of said county, do hereby certify that the foregoing instrument, with its certificate of authentication, was filed for record in my office on the 14 day of July, A. D. 1896, at 8 o'clock a. m., and this day recorded at 4 o'clock p. m.

Witness my hand and the seal of office this 28 day of July, 1896.

[SEAL.] R. N. COMPTON, *Co. Clk.*

THE STATE OF TEXAS, }
County of Freestone. }

I, C. B. Dunagan, clerk of the county court in and for said county, do hereby certify that the foregoing is a true and correct copy of a deed of record in my office, as shown in Book 10, page 89, deed records of Freestone county, Texas.

Given under my hand and seal of office, in Fairfield, this 22 day of June, 1898.

C. B. DUNAGAN,

[SEAL.] *County Clerk, Freestone County, Texas.*

Warranty deed. W. R. Boyd *et al.* to F. E. Hill.

34 EXHIBIT "K."

THE STATE OF TEXAS, }
County of Freestone. }

Know all men by these presents that we, W. R. Boyd, T. R. Watson, and J. B. Watson, of the county of Freestone, in the State aforesaid, for and in consideration of the sum of three hundred and ninety-nine ($399.00) dollars, to us paid by Chas. Robertson as follows: three hundred and ninety-nine dollars, cash in hand paid, the receipt of which is hereby acknowledged, have granted, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said Chas. Robertson, of the county of Freestone, State of Texas, all that certain tract or parcel of land lying and situate in Freestone county, Texas, and being a part of the Manuel Riondo eleven-league grant:

Beginning at a stake the N. E. corner of the H. Dowdy 320 acre survey, a P. O. brs. S. 21 E. 6 vrs., a P. O. brs. S. 55 W. 11½ vrs.,

Thence north 849⅘ vrs., a stake, a hickory 14 in. dia. brs. S. 60½ W. 3 vrs.;

Thence west 880 vrs., a stake, a B. J. 10 in. dia. brs. S. 61 E. 5 vrs., a do. 10 in. brs. N. 62½ W. 3 vrs.;

Thence south 849⅘ vrs., a stake, a P. O. 18 in. dia. brs. S. 23 W. 2. vrs.;

Thence east with the north line of said Dowdy survey 880 vrs. to the beginning, containing 133 acres.

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Chas. Robertson, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Chas. Robertson, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands, at Fairfield, this 10th day of Dec., A. D. 1895.

W. R. BOYD.
T. R. WATSON.
J. B. WATSON.

THE STATE OF TEXAS, }
County of Freestone. }

Before me, R. N. Compton, clerk of the county court in and for Freestone county, Texas, on this day personally appeared W. R. Boyd, T. R. Watson, and J. B. Watson, all of whom are known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that *he* executed the same for the purposes and consideration therein expressed.

35 Given under my hand and seal of office this 13th day of Dec., A. D. 1895.

R. N. COMPTON,
[SEAL.] *Clerk Co. Ct., Freestone Co., Tex.*

THE STATE OF TEXAS, }
County of Freestone. }

I, R. N. Compton, clerk of the county court of said county, do hereby certify that the foregoing instrument of writing, dated on the 10 day of Dec., A. D. 1895, with its certificate of authentication, was filed for record in my office on the 14 day of Dec., A. D. 1895, at 3 o'clock p. m., and was duly recorded this 16 day of Dec., A. D. 1895, at 2 o'clock p. m.

Witness my hand and the seal of the county court of said county, at office, in Fairfield, the day and year last above written.

R. N. COMPTON,
[SEAL.] *Clerk C. C., F. County, Tx.*

THE STATE OF TEXAS, }
County of Freestone. }

I, C. B. Dunagan, clerk of the county court in and for said county, do hereby certify that the foregoing is a true and correct copy of a deed of record in my office, as shown in Book 9, page- 117 & '18, deed records of Freestone county, Texas.

Given under my hand and seal of office, in Fairfield, this 22 day of June, 1898.

C. B. DUNAGAN,
[SEAL.] *County Clerk, Freestone County, Texas.*

Warranty deed. W. R. Boyd *et al.* to Chas. Robertson.

36 EXHIBIT "H."

THE STATE OF TEXAS, }
County of Freestone. }

Know all men by these presents that we, W. R. Boyd, T. R. Watson, and J. B. Watson, of the county of Freestone, in the State aforesaid, for and in consideration of the sum of nine hundred and fifty-five ($955.00) dollars, to us paid and secured to be paid by Geo. W. McAdams as follows: seventy-five dollars cash, the receipt of which is hereby acknowledged, and three certain promissory notes of Geo. W. McAdams of even date herewith, payable to W. R. Boyd, T. R. Watson, & J. B. Watson as follows: 1 note for $293.33⅓, due Dec. 1st, 1896; 1 note for $293.33⅓, due Dec. 1st, 1897; 1 note for $293.33⅓, due Dec. 1st, 1898, all bearing interest at 10 % per annum from date and each expressly stipulating a vendor's lien to secure the payment of same, have bargained, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said Geo. W. McAdams, of the county of Freestone, State of Texas, all that certain tract or parcel of land situated in Freestone county, Texas, and being a part of the Manuel Riondo eleven-league grant:

Beginning at a stake on the west line of Chas. Robertson's 133-acre tract out of said Riondo 11-league grant, just north of the Fairfi*l*ed and Butler road, from which stake a P. O. 17 in. dia. brs. S. 88 W. 5 vrs.,

Thence west 311 vrs. a stake, a P. O. 17 in. dia. brs. S. 65 E. 4¾ vrs., a P. O. 12 in. dia. brs. N. 45 E. 7 vrs.;

Thence N. 35 W., at 1,640 vrs. a dugout, at 1,666 vrs. a stone, from which a hickory 9 in. dia. brs. S. 82 W. ⅛ of a vara, an elm 6 in. dia. brs. S. 67 E. 4 vrs.;

Thence E., at 25 vrs. recross dugout, at 1,293 vrs. a stone in west line of A. Webb's survey, a B. J. 9 in. dia. brs. N. 23 E. 3 vrs., a B. J. 9 in. dia. brs. S. 72 W. ¾ vrs.;

Thence south 1,348 vrs. to the place of beginning, containing 191 acres; to have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Geo. W. McAdams, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Geo. W. McAdams, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof; but it is expressly agreed and stipulated that the vendor's lien is retained against the above-described property, premises, and improvements until the above-described notes and all interest thereon are fully paid according to their face and tenor, effect, and reading, when this deed shall become absolute.

37 Witness our hands, at Fairfield, this 28 day of February, A. D. 1896.

W. R. BOYD.
T. R. WATSON.
J. B. WATSON.

THE STATE OF TEXAS, }
County of Freestone. }

Before me, R. N. Compton, clerk of the county — in and for Freestone county, Texas, on this day personally appeared W. R. Boyd, T. R. Watson, and J. B. Watson, all of whom are known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that *he* executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 28 day of Feb'y, A. D. 1896.

R. N. COMPTON,
[SEAL.] *Cl'k Co. Ct., Freestone Co., Tex.*

THE STATE OF TEXAS, }
County of Freestone. }

I, R. N. Compton, clerk of the county court of said county, do hereby certify that the foregoing instrument of writing, dated on the 28 day of Feb'y, A. D. 1896, with its certificate of authentication, was filed for record in my office this 29th day of Feb'y, A. D. 1896, at 6 o'clock p. m., and duly recorded this 3rd day of March, A. D. 1896, at 10 o'clock a. m.

Witness my hand and the seal of the county court of said county, at office, in Fairfield, the day and year last above written.

R. N. COMPTON,
[SEAL.] *Cl'k C. C., F. County, Tex.*

THE STATE OF TEXAS, }
County of Freestone. }

I, C. B. Dunnagan, clerk of the county court in and for said county, do hereby certify that the foregoing is a true and correct copy of a deed of record in my office, as shown in Book 9, page 463, deed records of Freestone county, Texas.

Given under my hand and seal of office, in Fairfield, this 22nd day of June, 1896.

C. B. DUNAGAN,
[SEAL.] *County Clerk, Freestone County, Texas.*

Warranty deed. W. R. Boyd *et al.* to Geo. W. McAdams.

38 EXHIBIT " L."

THE STATE OF TEXAS, }
County of Freestone. }

Know all men by these presents that we, W. R. Boyd, T. R. Watson, and J. B. Watson, of the county of Freestone, in the State aforesaid, for and in consideration of the sum of one dollars, to us paid by J. M. Parker as follows: one dollars cash, the receipt of which is hereby acknowledged, and the further consideration of the execution and delivery to us by said J. M. Parker of his certain note, in

writing, agreeing to deliver to us 3 bales of lint cotton, to weigh 500 lbs. each, on or by Oct. 15th, 1898; also 3 bales of lint cotton, to weigh 500 lbs. each, on or by Oct. 1st, 1899; also 2 bales of lint cotton on or by Oct. 15th, 1900, said last two bales of cotton also to weigh 500 lbs. each, and all to class middling, have granted, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said J. M. Parker, of the county of Freestone and State of Texas, all that certain tract of land situated in Freestone county, Texas, as and being a part of the M. Rionda 11-league grant:

Beginning at a stake the N. E. corner of the H. Dowdy 320-acre survey, whence a P. O. brs. S. 21 E. 6 vrs., a P. O. brs. S. 55, W. 11½ vrs.,

Thence north with Chas. Robertson'- east bdy. line 849$^{4}_{0}$ vrs., his N. E. corner, 1,105 vrs., a stake, F. E. Hill's N. E. corner, a hickory 16 in. dia. brs. N. 44 E. 4 vrs.;

Thence E. 460 vrs., a stake, whence a B. J. 10 in. dia. brs. S. 45 W. 2 vrs. and a hickory 12 in. dia. brs. N. 30 W. 5 vrs.;

Thence S. 130 vrs., a stake, whence a B. J. 10 in. dia. brs. N. 24 E. 7 vrs.;

Thence east 235 vrs., a stake *a stake*, a B. J. 12 in. dia. brs. S. 60 W. 4 vrs.;

Thence S. 955 vrs., a stake in N. B. line of James tract, a P. O. 12 in. dia. brs. S. 25 W. 6 vrs.;

Thence W. 117, James' N. W. corner, a B. J. 4 in. dia. brs. S. 28 E. 8 vrs.;

Thence south 120 vrs., James' S. W. corner, a stake, whence a B. J. 14 in. dia. brs. S. 8 W. 8 vrs.;

Thence west 578 vrs. to place of beginning, containing 130 acres.

To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said J. M. Parker, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said J. M. Parker, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof; but it is expressly agreed and stipulated that the vendor's lien is retained against the above-described property, premises, and improvements until the above-described notes and interest thereon are fully paid according to its face and tenor, effect, and reading, when this deed shall become absolute.

39 Witness our hands this 30 day of October, A. D. 1897.

W. R. BOYD.
T. R. WATSON.
J. B. WATSON.

THE STATE OF TEXAS, }
County of Freestone. }

Before me, J. G. Anderson, a notary public in and for Freestone county, Texas, on this day personally appeared W. R. Boyd, T. R. Watson, and J. B. Watson, each known to me to be the person whose names are subscribed to the foregoing instrument, and ac-

knowledged to me that *he* executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 4 day of Nov., A. D. 1897.

J. G. ANDERSON,
[SEAL.] *Not. Pub., Freestone Co., Texas.*

THE STATE OF TEXAS, }
County of Freestone. }

I, C. B. Dunagan, clerk of the county court of said county, do hereby certify that the foregoing instrument of writing, dated on the 30 day of Oct., A. D. 1897, with its certificate of authentication, was filed for record in my office the 4th day of Nov., A. D. 1897, at 1 o'clock p. m., and duly recorded this 5 day of Nov., A. D. 1897, at 4 o'clock p. m.

Witness my hand and the seal of the county court of said county, at office, in Fairfield, the day and year last above written.

[SEAL.] C. B. DUNAGAN, *Co. Clk.*

THE STATE OF TEXAS, }
County of Freestone. }

I, C. B. Dunagan, clerk of the county court in and for said county, do hereby certify that the foregoing is a true and correct copy of a deed of record in my office, as shown in Book 11, page 345, deed records of Freestone county, Texas.

Given under my hand and seal of office, in Fairfield, this 22 day of June, 1898.

C. B. DUNAGAN,
[SEAL.] *County Clerk, Freestone County, Texas.*

Warranty deed. W. R. Boyd *et al.* to J. M. Parker.

40 EXHIBIT "M."

STATE OF LOUISIANA, }
Parish of Orleans, City of New Orleans. }

Before me, Peirre Charles Curellier, a notary public in and for this parish and city, duly commissioned and qualified, and in the presen*ts* of the witnesses hereinafter named and undersigned, personally appeared James W. Zacharie, a resident of this city, who declared, for the consideration and upon the terms and considerations hereinafter expressed, he does by these presents grant, bargain, sell, and convey, transfer, assign, and set over unto Colonel Joseph Smolerski, of Washington city, in the District of Columbia, here present, purchasing for himself, his heirs and assigns, a certain tract of land situate, lying, and being in the State of Texas, partly in the county of Anderson and partly in the county of Freestone, on both sides of the Trinity river, and estimated to contain the quantity of from twenty-seven to thirty thousand acres, more or

less, and being the remainder and residue (exclusive of all such tracts or parcels which the present vendor, by himself or his agent, has sold or contracted to sell up to this date, or which may be in possession of other parties under adverse title*d*) of a large tract of land in the said State of Texas known as the eleven-league grant, made to Manuel Riondo on the 2nd day of July, 1830, and of which the grantor was put in possession on the 26th day of November, A. D. 1833, by Vicente Alorito, commissioner, and, as appears by the plan annexed hereto, situated on both sides of the river Trinity, running down with the eleven league- measured by Don Ignacia Aquilcia and above by the six leagues of Don Brairaia Rivos Palocias, and commencing from the northwest of Suxnor Acquileras, which is the first landmark, and a *Ike top* whereof for reference is hereto annexed, and which the said James W. Zacharie acquired by mesne conveyance from said original grantee.

This sale is intended to cover and to include all the remaining lands lying within the limits of the said Manuel Riondo grant, which have not heretofore been sold or contracted to be sold by the said J. W. Zacharie or his agents, or are not held by adverse titles or possessions. And whereas the quantity so disposed of or so in possession is not at this time known, the said vendor only warrants to the extent of twenty-seven thousand acres, and will only refund to the purchaser the purchase-money *pro rata* on that amount and quantity for any dimention which would reduce to less than
41 twenty-seven thousand acres the quantity of land which passes to the purchaser; but if there is more the purchaser is not to pay any surplus of price, but all surplus of land over said twenty-seven thousand acres passes to him by this sale.

The consideration and price of this sale is the sum of fifteen thousand dollars, for which the said purchaser has furnished thirteen promissory notes, dated this day, made and subscribed by him, to the order of the said vendor, all made payable at either of the banks in the city of New Orleans, one of the said notes being for the sum of three thousand dollars, due and payable on the first day of May, eighteen hundred and sixty-six, with interest, at the rate of eight per cent. per annum, after maturity until paid, and the other twelve being each for the sum of one thousand dollars and due and payable respectively one on or before the first day of May in each of the years 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, and 1878, all bearing interest, at the rate of eight per cent. per annum, from and after the first day of May, eighteen hundred and sixty-six, until final payment, but with the understanding and condition that any and all of the said notes may be taken up and paid by the maker thereof at any time between the said first day of May, 1866, and the day of their reepective maturity, with such interest only as shall have accrued thereon up to the day of th- -ayment thereof, shall be tendered, which said thirteen notes have been countersigned *nerusectur* by me, the said notary, in order to identify them with this act, and delivered to the said vendor, who acknowledges possession thereof; and, the better to secure and guarantee the punctual payment of the said notes and of all inter-

est, cost, and charges which may accrue thereon, it is hereby expressly agreed and understood that the vendor retains a lien and privilege on the *the* said lands herein conveyed, and, further, that the said lands, together with all the buildings and improvements which are now or may hereafter be put upon the same, are and shall remain specially mortgaged and hypothecated until the full and final payment of the said notes and interest, and the purchaser *besides* himself, his heirs and assigns, not to sell, convey, transfer, or in any manner alienate the said lands and improvements to the prejudice of said lien and mortgage, which shall also ensure to the use and benefit of any future holder or holders of the said notes; and, should any of the said notes fail to be punctually paid at maturity and remain so unpaid for six months thereafter, then and in that case the vendor shall have the right *ipso facto*, on showing the same, to cancel and to annul this sale and to re-enter upon, repossess the said lands, the purchaser forfeiting all payments which he may have previously made and losing all claims or recourse against the said vendor or his heirs for any part of the purchase price which he or they may have previously received.

42

It is also further agreed, understood, and stipulated that for the purpose of ascertaining the exact quantity of land hereby conveyed surveys thereof shall be made at joint expenses, each of the contracting parties furnishing a surveyor, and the certificates of said surveyors shall be *prima facie* evidence as to the quantity which by the effect of this sale passes from the vendor to the vendee, and should such quantity be less than the twenty-seven thousand acres which the said vendor guarantees, then the said purchaser shall be entitled to a reduction of the price on his outstanding unpaid notes, said reduction to be made *pro rata*, at the rate of fifteen-twenty-sevenths of a dollar short of the said twenty-seven thousand acres; but the said purchaser shall have the right to make up any such deficiency out of any of the already conveyed or contracted to be conveyed proceeds of said original grant which may eventually revert to the vendor's possession of the full compliment of twenty-seven thousand acres herein guaranteed. He will be bound to pay back to the vendor any amount which may have been deducted, as aforesaid, from the purchase price.

United States internal-revenue stamps of the value of fifteen dollars are hereon affixed and cancelled.

Now personally appeared and intervened herein Mistress Caroline Elizabeth Deer, of full age, the wife of said vendor, who, having had the foregoing act read and explained to her, did declare unto me, notary, that it is her wish and intention to release in favor of the said purchaser the property herein described from the matrimonial, dat*ed* parephe-*nal*, and other rights, and from any claims, mortgages, or other privileges to which she is or may be entitled, whether by virtue of her marriage with her said husband or otherwise; whereupon I, the said notary, did inform the said wife, apart and out of the presence and hearing of her said husband and before receiving her signature, that she had by law a legal mortgage on

the property of her said husband, firstly, for the restitution of her dowery and for the reinvestment of the dated property sold by her husband and which she brought in marriage, reckoning from the celebration of the marriage; secondly, for the restitution and reinvestment of the dated property by her acquired since
43 marriage, whether by succession or donation, from the day of the succession was opened or the donation perfected; thirdly, for nuptial presents; fourthly, for debts, and fifthly, for the amount of her para-he-mal property alienated by her and received by her said husband or otherwise disposed of for the individual interest of her said husband; and the said wife did thereupon declare unto me, notary, that she was fully aware and acquainted with the nature and extent of the matrimonial, dated, parephe-mal, and other rights and privileges that secured to her by the second section of an act passed by the legislature, &c., of this State authorizing wives to make valid renunciation, &c., approved on the fifteenth day of March, eighteen hundred and fifty-five.

She, nevertheless, did persist in her intention of renouncing not only all the rights, claims, and privileges hereinbefore enunciated and described, but all others of any nature whatever to which she is or may be entitled by any laws now or hereinafter in force in the State of Louisiana or elsewhere; and the said husband, being now present, aiding and authorizing his said wife, did again declare that she did and does hereby make a formal renunciation and relinquishment of all her said matrimonial, dated, paraphe-mal, and other rights, claims, and privileges in favor of the said purchaser, binding herself and her heirs at all times to sanction and acknowledge the validity of this *nomanclatoria*. And passed at New Orleans (in duplicate, one of which remains of record in this office and the other has been delivered to said vendee) this nineteenth day of August, in the year one thousand eight hundred and sixty-five, in the presents of St. Calombe Davis and Austrim Corean, witnesses, who sign these presents with the appearances and the notary.

J. W. ZACHARIE.
C. T. SMOHIESKI.
C. E. ZACHARIE.
G. CHL. CRUBELLIN,
Notary Public.

UNITED STATES OF AMERICA, }
State of Louisiana. }

OFFICE OF SECRETARY OF STATE.

I, S. Westnonski, secretary of state, do hereby certify that the record- of this office show that Plehas Cuvellier was duly appointed and commissioned by I. Marion Wells, governor of the State of Louisiana, notary public *and* for the parish of Orleans the 30th day of June, 1865, and that the said commissioner was not revoked at the date hereinafter specified, to wit, 13th Sept., 1865.

In testimony whereof I have affixed my signature and the seal of

the State, at the city of New Orleans, this 13th day of Sept.,
44 in the year of our Lord one thousand eight hundred and sixty-five, and of the Independence of the United States the nine*teenth*.

S. WESTNONSKI,
Sec'y of State.

I certify that the foregoing certificate and deed or conveyance was filed in my office for record the 22nd day of December, 1865, and was duly recorded at 3 o'clock p. m. on said day.

J. A. WOMACK,
County Clerk, F. C.

THE STATE OF TEXAS, }
County of Freestone. }

I, C. B. Dunagan, clerk of the county court in and for said county, de hereby certify that the foregoing is a true and correct copy of a deed of record in my office, as shown in Book H, pages 609 to 612, of Freestone county, Texas.

Given under my hand and seal of office, in Fairfield, this 13 day of December, 1898.

C. B. DUNAGAN,
County Clerk, Freestone County, Texas,
[SEAL.] By H. J. GRIFFITH, *Deputy.*

Five 2c. internal-revenue stamps affixed and cancelled.

45 EXHIBIT "N."

STATE OF LOUISIANA:

By this public instrument of protest be it known that on this fourth day of May, in the year one thousand eight hundred and sixty-six, at the request of the cashier of and holder for the Citizens' Bank of Louisiana of the original note, whereof a true copy is on the reverse hereof written, I, Adolphe Boudousa, a notary public in and for the city and parish of New Orleans, State of Louisiana, duly commissioned and sworn, by my deputy, Charles G. Sudog, in order to demand payment of said note, made due and diligent search and inquiry for the drawer thereof from various persons and at sundry places, and particularly from Mr. Henry Payehaud, to whom I presented said note and demanded payment thereof, and by whom I was informed that the said drawer was absent from the State, had no agent here, and had intended to place money in his hands to meet the payment of said note, which he has failed to do.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these *president* do publicly and solemnly protest, as well against the drawer or maker of the said note as against all others whom it doth concern, for all exchange, damages, costs, charges, and interests suffered or to be suffered for want of payment of the said note.

Thus done and protested in the presence of Charles G. Sudog and Adolphe Blache, both of this city, witnesses.

In testimony whereof I grant these presents, under my signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

[SEAL.] AD. BOUDOUSA, *Not. Pub.*

$3,000. NEW ORLEANS, *August 19th*, 1865.

On the first of May, eighteen hundred and sixty-six, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of three thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after maturity until paid.

I. SMOLINSKI.

(Endorsed:) J. W. Zacharie.

Written across the face thereof: *Ne varietur.* Secured by mortgage, *fuly* stamped. New Orleans, August 19th, 1865. P. Ch. Cuvellier, not. pub.

46 $1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and sixty-seven, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed across the face thereof: *Ne varietur.* Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs. Curvellier, not. pub.

$1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and sixty-eight, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed across the face thereof: *Ne varietur.* Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs. Curvellier, not. pub.

$1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and sixty-nine, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed across the face thereof: *Ne varietur*. Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs. Curvellier, not. pub.

$1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and seventy, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed on the face thereof: *Ne varietur*. Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs. Curvellier, not. pub.

47 $1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and seventy-one, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed across the face thereof: *Ne varietur*. Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs Curvellier, not. pub.

$1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and seventy-two, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum,

from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed across the face thereof: *Ne varietur.* Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs. Curvellier, not. pub.

$1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and seventy-three, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed across the face thereof: *Ne varietur.* Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs. Curvellier, not. pub.

$1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and seventy-four, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed on the face thereof: *Ne varietur.* Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs. Curvellier, not. pub.

48 $1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and seventy-five, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed across the face thereof: *Ne varietur.* Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs. Curvellier, not. pub.

$1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and seventy-six, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed across the face thereof: *Ne varietur.* Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs. Curcellier, not. pub.

$1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and seventy-seven, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed across the face thereof: *Ne varietur.* Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs. Curvellier, not. pub.

$1,000. NEW ORLEANS, *August 19th*, 1865.

On or before the first day of May, eighteen hundred and seventy-eight, I promise to pay to the order of James W. Zacharie, at either of the banks in this city, the sum of one thousand dollars, value received, with interest, at the rate of eight per cent. per annum, from and after the first of May, eighteen hundred and sixty-six, with the understanding that this note may be taken up by me at any time before maturity, with such interest only as shall accrue up to the day it is so taken up.

I. SMOLINSKI.

Endorsed across the face thereof: *Ne varietur.* Secured by mortgage, duly stamped. New Orleans, August 19th, 1865. P. Chs. Curvellier, not. pub.

49 *Demurrer of the Respondents.*

Filed January 10th, 1899.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

AMELIA L. HOWARD ET AL.
vs.
P. DE CORDOVA ET AL. } No. 467. In Equity.

The demurrer of the above-named defendants, P. De Cordova, W. R. Boyd, F. E. Hill, Charles Robertson, J. M. Parker, and Geo. W. McAdams, to the amended bill of complaint of the plaintiffs herein.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiffs' amended bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that:

First. It appears from the face of plaintiffs' amended bill that the bill seeks to set aside, cancel, and annul the judgment of the district court of Freestone county, State of Texas, and this court has no jurisdiction or power to cancel, set aside, or annul the judgment of the State court, said court having jurisdiction both over the subject-matter and of the persons in said suit, said suit being a partition suit and the proceeding one *in rem*.

Second. The amended bill shows upon its face that the object of the bill is to obtain a new trial in this court in cause No. 1960, tried and determined in the district court of Freestone county, Texas, as shown by the exhibits to the bill, under and in accordance with art. 1575 of the Revised Statutes of Texas.

That this proceeding is but a continuation of said suit and this court has no jurisdiction of the same, but the district court of Freestone county, Texas, alone has jurisdiction of the same.

Third. That the judgment of the district court of Freestone county, Texas, is valid and binding upon all of the parties to this suit, and this court has no jurisdiction, power, or authority to review or to cancel and annul the same for the pretended fraud, as set out in plaintiffs' bill, or for any other cause therein stated.

50 Wherefore these defendants respectively demand the judgment of this court whether they shall be compelled to make any other or further answer to the said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

WARD & JAMES,
Solicitors for Defendants.

STATE OF TEXAS, }
County of Travis. }

P. De Cordova makes solemn oath and says that he is one of the defendants in this cause, and that the foregoing demurrer is not interposed for delay.

P. DE CORDOVA.

Subscribed and sworn to before me this 7 day of Jan'y, A. D. 1899.

S. D. DE CORDOVA,
[SEAL.] *Notary Public, Travis County, Texas.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

ASHBY S. JAMES,
Of Counsel for Defendants.

And should said demurrer to the whole of said bill be overruled these defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiffs' amended bill to be true in such manner and form as the same are therein set forth and alleged, as to so much and such parts of said bill as hereinafter set forth, do demur:

First. To that part of said amended bill which refers to the alleged contract made on the 26th day of February, A. D. 1852, between Jacob and Phineas De Cordova and J. W. Zacharie, and state that the same is insufficient because said contract is not set forth, so that this court can construe and determine the same, and because said bill shows that said contract was read in evidence in the said suit tried and determined in the district court of Freestone county, State Texas, as shown by the exhibits to plaintiffs' bill on the trial of said cause, and was by said court construed, and the construction put upon the same is binding upon plaintiffs in this cause, and this court has no power to reverse the action of said court in that regard.

Second. To that part of said amended bill which sets up the statute of limitations as to De Cordova's right to maintain the partition suit in Freestone county, Texas, and the allegation that the contract had been abandoned by him and the allegations attacking the fairness of said partition in said court as to quantity and
51 quality of the land awarded by the decree of partition, these defendants say that each and all of those matters were entirely within the jurisdiction of the said district court of Freestone county, Texas, and the action of said court in regard thereto was and is binding on these plaintiffs and on this court, and that this court has no jurisdiction or power to revise the action of said court, as is clearly shown by the allegations of said bill.

Wherefore, and for divers other errors and imperfections appearing in the said amended bill, these defendants pray the judgment of

this honorable court whether they shall be compelled to make any answer to such parts of the said bill as is so demurred unto, as aforesaid, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

WARD & JAMES.

STATE OF TEXAS,
County of Travis.

P. De Cordova makes solemn oath and says that he is one of the defendants in the above suit, and that the foregoing demurrers are not interposed for delay.

P. DE CORDOVA.

Subscribed and sworn to before me this 7 day of January, A. D. 1899.

S. D. CORDOVA,
Notary Public, Travis County, Texas.

[SEAL.]

I hereby certify that, in my opinion, each and all of the foregoing demurrer are well founded in point of law.

ASHBY S. JAMES,
Of Counsel for Defendants.

The foregoing has the following endorsement, to wit: No. 487. Amelia L. Howard *et al. vs.* P. De Cordova *et al.* Demurrer of respondents. Filed Jan. 10, 1899. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

52 *Final Decree.*

Filed March 2nd, 1899.

In the U. S. Circuit Court for the Northern District of Texas, at Dallas. In Equity.

AMELIA L. HOWARD ET AL.
vs.
P. DE CORDOVA ET AL. } No. 487.

This cause having come on to be heard on the 28th of February, 1899, on a demurrer of the respondents to the bill of the complainants, in which demurrer the jurisdiction of the court is challenged, and the parties having been heard by their respective solicitors, and the court being fully advised in the premises, it is ordered, adjudged, and decreed on this the 2nd day of March, 1899, that the bill of the complainants herein be dismissed for want of jurisdiction of the matter in controversy, with costs to the defendants, to be taxed; to which order and decree complainants then and there in open court excepted, which exception is here allowed.

EDWARD R. MEEK, *Judge.*

The foregoing has the following endrosement, to wit: No. 487. In equity. Amelia L. Howard *et al. vs.* P. De Cordova *et al.* De-

cree dismissing suit. Filed 2 day of M'ch, 1899. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

53 *Assignments of Error.*

Filed March 2nd, 1899.

In the Circuit Court of the United States for the Northern District of Texas. In Equity.

AMELIA L. HOWARD ET AL.
vs.
P. DE CORDOVA ET AL. } No. 487.

Complainants' assignments of error.

Now, on this the 2nd of March, 1899, come the complainants in the above cause, by Farrar & Williams and F. C. Zacharie, their solicitors, and say the order and decree in said cause dismissing said complainants' bill for want of jurisdiction of the subject-matter in controversy is erroneous and against the just rights of the complainants for the following reasons:

1st. The bill shows that this court had jurisdiction of the subject-matter in controversy.

2nd. The bill shows that the matter in dispute exceeds, exclusive of interests and costs, the sum of $5,000.00.

3rd. The bill shows that the controversy is between citizens of different States.

4th. The bill shows that the proceedings had in the State court in the case of P. De Cordova *vs.* The Unknown Heirs of J. W. Zacharie were unknown to the complainants through the fraud of respondents (there being service by publication only upon complainants in said suit in the State court) until long after the rendition of the judgment therein; that there was no personal citation of them and no appearance by them as parties to said proceedings.

5th. Because the bill shows on its face that it is an original proceeding, upon new facts not disclosed in the proceedings in the State court, attacking the judgment of the State court for fraud in the procurement thereof by the respondents P. De Cordova and W. R. Boyd, and not a bill seeking to review the judgment of the State court for any irregularity or error therein.

FARRAR & WILLIAMS &
F. C. ZACHARIE,
Solicitors for Complainants.

The foregoing has the following endorsement, to wit: No. 487 In equity. Amelia L. Howard *et al. vs.* P. De Cordova *et al.* Assignments of error. Filed M'ch 2, 1899. J. H. Finks, clerk, by Chas. L. Lednum, deputy.

54 *Petition for Appeal.*

Filed March 2nd, 1899.

In the Circuit Court of the United States, Northern District of Texas, at Dallas. In Equity.

AMELIA L. HOWARD ET AL.
vs.
P. DE CORDOVA ET AL. } No. 487.

The above-named complainants, A. L. Howard, Harriet S. Hardee, Caroline A. Owen, Emma C. O. Zacharie, Florence D. Zacharie, Florence F. Ellis, by her next friend, James S. Zacharie; Francis C. Zacharie, and James S. Zacharie, conceiving themselves aggrieved by the order and decree made and entered on the 2nd day of March, 1899, dismissing the above-entitled cause for want of jurisdiction, do hereby appeal from said order and decree to the Supreme Court of the United States, as authorized by section five of the act of Congress of the United States approved March 3rd, 1891, and petitioners herewith file their bond in the penal sum of five hundred dollars, which bond is approved by the Hon. E. R. Meek, one of the judges of this court.

Petitioners pray that this appeal may be allowed; that the question of jurisdiction of this court may be certified to the Supreme Court of the United States, as provided by law, and that all records and proceedings and papers upon which said order and decree was so made, duly authenticated, may be sent to the Supreme Court of the United States.

Dallas, Texas, March 2nd, 1899.

FARRAR & WILLIAMS &
F. C. ZACHARIE,
Solicitors for Complainants.

The foregoing has the following endorsement, to wit: No. 487. In equity. Amelia L. Howard *vs.* P. De Cordova *et al.* Petition praying for an appeal. Filed 2 day of M'ch, 1899. J. H. Finks, clerk by Chas. H. Lednum, deputy.

55 *Order Allowing Appeal.*

Filed March 2nd, 1899.

In the Circuit Court of the United States, Northern District of Texas, at Dallas. In Equity.

AMELIA L. HOWARD ET AL.
vs.
P. DE CORDOVA ET AL. } No. 487.

Upon consideration of the petition for appeal to the Supreme Court of the United States, filed herein by complainants, Amelia L. Howard, Harriett S. Hardee, Caroline A. Owen, Emma C. O. Zach-

arie, Florence D. Zacharie, Florence F. Ellis, by her next friend, J. S. Zacharie; Francis C. Zacharie, and James S. Zacharie, it is ordered that said appeal be granted, bond therefor in the sum of five hundred dollars having been executed and approved by the court.

This appeal is granted solely upon the question of jurisdiction, and the question as to whether or not the circuit court has jurisdiction of the subject-matter in controversy is hereby certified to the Supreme Court of the United States.

This appeal is prayed and allowed in open court at the term at which the judgment appealed from was rendered.

This March 2nd, 1899, Dallas, Texas.

EDWARD R. MEEK, *Judge.*

The foregoing has the following endorsement, to wit: No. 487. In equity. Amelia L. Howard *et al. vs.* P. De Cordova *et al.* Order allowing appeal. Filed 2 day of March, 1899. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

56 *Appeal Bond.*

Filed March 17, 1899.

Bond # 186, Dallas Office.

Know all men by these presents that we, Amelia L. Howard, Harriott S. Hardee, Caroline A. Owen, Emma C. O. Zacharie, Florence D. Zacharie, Florence Z. Ellis, by next friend, J. S. Zacharie; F. C. Zacharie, and James S. Zacharie, are held and firmly bound unto P. De Cordova, W. R. Boyd, F. E. Hill, Chas. Robertson, J. M. Parker, George W. McAdams, Joseph Smolenski in the full and just sum of five hundred dollars ($500), to be paid to the said P. De Cordova, W. R. Boyd, F. E. Hill, Charles Robertson, J. M. Parker, Geo. W. McAdams, and Joseph Smolenski, certain attorney, executor, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a term of the United States circuit court for the northern district of Texas, at Dallas, in the State of Texas, in a suit depending in said court between Amelia L. Howard, Harriott S. Hardee, Caroline A. Owen, Emma C. O. Zacharie, Florence D. Zacharie, Florence Z. Ellis, by her next friend, J. S. Zacharie; F. C. Zacharie, and J. S. Zacharie and P. De Cordova, W. R. Boyd, F. E. Hill, Chas. Robertson, J. M. Parker, Geo. W. McAdams, and Joseph Smolenski — was rendered against the said Harriott S. Hardee, Amelia L. Howard, Caroline A. Owen, Emma C. O. Zacharie, Florence D. Zacharie, Florence Z. Ellis, by her next friend, J. S. Zacharie; J. S. Zacharie, and F. C. Zacharie; and the said Amelia L. Howard, Harriott S. Hardee, Caroline A. Owen, Emma C. O. Zacharie, Florence D. Zacharie, Florence Z. Ellis, *and* by her next friend,

J. S. Zacharie; F. C. Zacharie, and J. S. Zacharie having obtained an order of appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, the motion for appeal having been made and granted in open court, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington in not exceeding thirty days from the second day of March, 1899:

Now the condition of the above obligation is such that if the said Amelia L. Howard, Harriott S. Hardee, Caroline A. Owen, Emma C. O. Zacharie, Florence D. Zacharie, Florence Z. Ellis, by her next friend, J. S. Zacharie; F. C. Zacharie, and J. S. Zacharie shall
57 prosecute the said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. L. HOWARD. [L. S.]
HARRIOTT S. HARDEE. [L. S.]
F. C. ZACHARIE. [L. S.]
JAMES S. ZACHARIE. [L. S.]
C. A. OWEN. [L. S.]
FLORENCE Z. ELLIS, [L. S.]
By JAMES S. ZACHARIE.
EMMA C. O. ZACHARIE. [L. S.]
FLORENCE D. ZACHARIE. [L. S.]
AMERICAN SURETY COMPANY
OF NEW YORK,
By EDWIN R. REARDON,
Resident Vice-president
[SEAL.]
SAM P. COCHRAN,
Resident Assistant Secretary.

Sealed and delivered in presence of—
WM. R. KER.
W. P. KILLELEA.

Approved by—
EDWARD R. MEEK,
U. S. District Judge.

STATE OF LOUISIANA, } ss:
Parish of Orleans, }

Personally came and appeared before me, the undersigned notary public, A. L. Howard, Harriott S. Hardee, F. C. Zacharie, James S. Zacharie, C. A. Owen, James S. Zacharie for Florence Z. Ellis, Emma C. O. Zacharie, and Florence D. Zacharie, who executed and signed the foregoing instrument in the presence of the attesting witnesses, and who acknowledged the same to be their act and deed for the uses and purposes therein set forth.

Witness my hand and official seal this ninth day of March, A. D. 1899.

[SEAL.] C. M. EUSTIS, *Not. Pub.*

UNITED STATES OF AMERICA,
State of Louisiana.

I, the undersigned, secretary of state of the State of Louisiana, do hereby certify that Clifford M. Eustis, before whom the annexed acknowledgment was taken, was at the time of taking the same a notary public in and for the parish of Orleans, in the State of Louisiana, duly commissioned by the executive authority of said State of Louisiana and authorized under the laws of Louisiana to take acknowledgment and proof of the execution of deeds and other instruments in writing, and to administer oaths and affirmations
58 to be used in any court in said State of Louisiana and for general purposes; that his signature thereto is genuine, as I verily believe; that said document purports to be taken in all respects as required by the laws of the State of Louisiana, and that said attestation is in due form and by the proper officer.

Given under my signature, authenticated with the impress of the seal of the State of Louisiana, at the city of Baton Rouge, this tenth day of March, A. D. 1899.

JOHN T. MICHEL,
[SEAL.] *Secretary of State.*

The foregoing has the following endorsement, to wit: No. 487. Eq. Amelia L. Howard *et al. vs.* P. De Cordova *et al.* Appeal bond. Filed 17 day of March, 1899. J. H. Finks, clerk, by Chas. H. Lednum, deputy

59 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States, in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record, bill of exceptions, assignments of error, and order of appeal in open court, and all proceedings in cause No. 487, equity, wherein Amelia L. Howard *et al.* are complainants and P. De Cordova *et al.* are respondents, as fully as the same remains on file and of record in my office at Dallas, Texas.

Witness my hand officially and the seal of said court, at Dallas, Texas, this the 18th day of March, A. D. 1899, and of American Independence the 123rd year.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

Endorsed on cover: File No., 17,343. N. Texas C. C. U. S. Term No., 758. Amelia L. Howard, Harriott S. Hardee, Caroline A. Owen, *et al.*, appellants, *vs.* P. De Cordova, W. R. Boyd, F. E. Hill, *et al.* Filed April 1st, 1899.

1.

United States Supreme Court

October Term, 1886.

AMELIA L. HOWARD, TALBOT S. HARRIS, CAROLINE A. OWEN *ET ALS.*, APPELLANTS,

vs.

P. DE CORDOVA, W. R. BOYD, P. E. HILL *ET ALS.*, APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR COMPLAINANTS AND APPELLANTS.

F. C. ZACHARIE,
Solicitor for Complainants and Appellants.

No. 758.

United States Supreme Court

October Term 1898.

AMELIA L. HOWARD, HARRIOTT S. HARDEE, CAROLINE A. OWEN *ET ALS.*, APPELLANTS,

vs.

P. DE CORDOVA, W. R. BOYD, F. E. HILL *ET ALS.*, APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR COMPLAINANTS AND APPELLANTS.

The sole question presented in this case is that of the jurisdiction of the United States Circuit Court at Dallas to hear and determine this cause; and this question of jurisdiction grows out of the following statement of facts as exhibited by the record.

At the February Term of the District Court of Freestone county, Texas, P. De Cordova filed a suit by his attorney, W. R. Boyd, in that Court against the unknown heirs of J. W. Zacharie, deceased, and another alleging that he was the legal owner in fee simple of an equal undivided one-sixth of certain

lands situated partly in Freestone and partly in Anderson county, Texas. On the 9th day of November, 1895, W. R. Boyd, attorney for the plaintiff in this suit, makes affidavit before the clerk "that the residence of Joseph Smolenski is to him unknown, that the names of the heirs of J. W. Zacharie is to him unknown."

This affidavit was made in order to procure service by publication under the Texas statutes, which is admitted to have been regular in order to acquire jurisdiction in that proceeding, and the statute is not therefore quoted. Publication was made as required by the statute for the requisite length of time, the sheriff made his return of service by publication, and on the 8th of September, 1896, R. L. Williford, Esq., an attorney at law, was appointed by the District Court of Freestone county, Texas, to represent "the defendants, Joseph Smolenski and the said unknown heirs of J. W. Zacharie." This appointment was made by virtue of a Texas statute, and the appointment is conceded to be regular and that the law required it to be made. The case was tried by the Court upon an agreed statement, signed by W. R. Boyd, plaintiff's attorney in this suit, and R. L. Williford, the attorney appointed by the Court to represent the unknown heirs of J. W. Zacharie and Joseph Smolenski, which statement was approved by the Court. This proceeding is regular and in accordance with the Texas statutes which is therefore not quoted. Judgment was rendered for the plaintiff, and commissioners appointed who at the September Term of the Court made the report of the partition made by them, and this report is confirmed by the Court at the September Term of the said District Court.

This proceeding is admitted to be regular and in conformity with the Texas statute, which is not therefore quoted. The

original bill and the amendment thereto implicitly, if not expressly, admits the regularity of all the proceedings culminating in a final judgment in the District Court of Freestone county, Texas. Under the Revised Statutes of Texas, which took effect on the 29th of April, 1895, and in force at the date of the judgment of the District Court are found these provisions:

1st. Art. 1375. In cases in which judgment has been rendered on service of process by publication, when the defendant has not appeared in person or by an attorney of his own selection, a new trial may be granted by the Court upon the application of the defendant for good cause shown, supported by affidavit, filed within two years after the rendition of such judgment.

Art. 1376. In the cases mentioned in the preceding article a petition shall be filed and service of process made upon the parties adversely interested in the judgment as in other cases.

Art. 1377. In the cases mentioned in the two preceding articles, process on such judgment shall not be suspended, unless the defendant or party applying therefor, shall give bond, with two or more good and sufficient sureties, to be approved by the clerk in double the amount of the judgment, or value of the property adjudged, payable to the plaintiff in the judgment, conditioned that the party will prosecute his petition for new trial to effect and will perform such judgment as may be rendered by the Court should its decision be against him.

Art. 1378. When in such cases as is mentioned in the three preceding articles, property has been sold under the judgment and execution before the process was suspended, should he defeat plaintiff's action, shall not recover the property so sold but shall have judgment against the plaintiff in the judgment for the proceeds of such sale."

On the 7th of July, 1898, not less than two years after the date of the final judgment in the District Court of Freestone county, Texas, the complainants, who are the only heirs of J. W. Zacharie, deceased, filed their original bill in this cause, No. 487, in Equity, in the United States Circuit Court, at Dallas, against P. De Cordova, W. R. Boyd, Joseph Smolenski, and F. E. Hill, Charles Robertson, J. M. Parker, and George W. McAdams, the four last respondents being purchasers of a portion of the land adjudged to plaintiff in the Freestone county judgment or a part of the land conveyed by P. De Cordova to W. R Boyd. An amended bill was filed by complainants on January 10th, 1899. The case made by the original bill and the amendment is one of fraud on the part of P. De Cordova and his attorney, W. R. Boyd, in the procurement of the judgment in the District Court of Freestone county, Texas. The frauds alleged in the bill and its amendment were not issues in the suit in Freestone county, but consisted of facts arising in the service of the citation by publication, in the trial of that cause in imposing upon and deceiving the judge who tried that cause as to the facts, and finally fraud in the report of the commissioners, upon which the final judgment was based, or rather fraud in the suppression of facts known to P. De Cordova, which had they been known to the commissioners or the Court would have resulted in a different judgment from that rendered. Those various steps taken by P. De Cordova and his attorney are set forth with great particularity in the original bill and its amendments, which may be condensed and summarized as follows: That the affidavit for service by citation, annexed to P. De Cordova's original petition, was made by his attorney, W. R. Boyd; that on May 16th, 1892, W. R. Boyd had corresponded with one of the complainants,

J. S. Zacharie, at New Orleans, in regard to the Zacharie lands; that at the time of making said affidavit both P. De Cordova and W. R. Boyd knew the names and places of residence of the heirs of J. W. Zacharie, deceased, who are complainants herein; that the citation for publication was published in the Northern Vindicator, in a remote part of the county of Freestone from the county site and remote from the lands, probably 35 or 40 miles; that such publication was calculated to withhold information of the pendency of the suits from complainants and their agent who resided near said lands, and did have this effect; that complainants knew nothing of said suit during its pendency and not till long after final judgment was rendered therein—that P. De Cordova, by his attorney W. R. Boyd, alleged in his original petition "that he, P. De Cordova, is the legal owner in fee simple and of an equal undivided one-sixth interest in the hereinafter described land, and is entitled to partition and division of same;" that this allegation was false, as shown by Exhibit F. which was a contract by J. W. Zacharie with P. De Cordova and J. De Cordova for certain services to be rendered by them in having the grant placed on the map, and in making compromises and sales with settlers on the grant, to make a full title for one-third of all the lands which shall be secured with a clear title by compromise or survey and to allow the said De Cordovas one-third of all receipts made by sale of said lands by way of compromise." which instrument was relied on as shown by the agreed statement of facts in the Freestone District Court to establish the fact alleged in the petition that P. De Cordova was the owner in fee simple of one-sixth undivided interest in the entire eleven league grant; that this instrument marked Exhibit F. and quoted in part above was the only evidence of P. De Cordova's right or title to any part

of the Rionda grant (of which the land recovered by P. De Cordova in the Freestone county District Court is a part,) that complainants believe and charge the fact to be that said Exhibit F. dated February 26th, 1852, was not read in evidence to the Presiding Judge Rufus Hardy (who tried said cause) and that its contents were not made known to him in any way and that he was deceived and imposed upon as to the contents of said instrument marked Exhibit F. and dated Feb. 26th, 1852, both by the allegations of the petition and the agreed statement of the attorneys found in the record in which the instrument marked F. and dated Feb. 26th, 1852, is stated to be a "deed or transfer from J. W. Zacharie to Jacob De Cordova and Phineas De Cordova, dated Feb. 26th, 1852, recorded in Vol. H, 1, p. 557, deed records of Freestone county, Texas, conveys an undivided one third interest in eleven leagues granted to Manuel Riondo"—that complainants cannot state that said imposition and deception practiced upon the Court was done designedly or fraudulently, but if such was not the character of the deception and imposition, it was done by accident or mistake and is no less a fraud upon complainants rights, because it resulted in an unjust and inequitable judgment, depriving complainants of a considerable part of their property upon untrue and false statements in the original petition in the District Court of Freestone county, and upon untrue and false statements in the agreed statement of facts upon which the case was tried in said District Court, the real facts being withheld from the Judge trying the case; and that he signed and approved said agreed statement relying upon its correctness, because agreed to by the attorneys, when in fact said agreed statement was false in fact, and the Judge was thus deceived; and the complainants charge as another act of fraud that the Exhibit marked G. in the record, which reads as follows:

"According to an account furnished by J. W. Zacharie of New Orleans, it shows that I am largely in his debt, therefore, for and in consideration of the premises and two hundred and fifty dollars cash to me in hand paid, I do hereby relinquish to the said J. W. Zacharie all my rights, titles, interest and claim in and to the Rionda grant of 11 leagues in any shape or form, and hereby declare that the said contract is this day cancelled and annulled. (Signed) J. DE CORDOVA.

"Galveston, May 7th, 1860.

"Filed Sept. 16th, 1865. J. H. GROTH,

"Clerk County Court of A. Co."

Was stated in said agreed statement of facts upon which the case was tried, thus: "5th. J. De Cordova to J. W. Zacharie receipt and relinquishment of all his interest in M. Rionda 11 league grant, dated May 7th, 1860, recorded in Vol. H 1, page 579, records of Freestone county, Texas." Whereas, in truth and fact of J. De Cordova and P. De Cordova being joint covenantes in the executory contract of Feb. 26th, 1852, styled Exhibit F, that said release and relinquishment of J. De Cordova operated as a release or relinquishment by both the De Cordovas to J. W. Zacharie, and neither of them had any right or interest therein thereafter, and that the character of this instrument of May 7th, 1860, was withheld from the presiding Judge under said agreed statement, and he was deceived thereby; and they further charge as a stop and as use of the several fraudulent acts of P. De Cordova, the plaintiff in the suit in Freestone county withheld from the Court information in his possession to the effect that J. W. Zacharie had in his life time made a full and complete settlement in May, 1860, with the said J. De Cordova and P. De Cordova, paying them in full under the contract of Feb. 26th, 1852, their one-

third in full, as shown by the itemized account set out in Exhibit E, and also by the instrument dated May 7th, 1860; and the Court or Judge, misled and deceived by the suppression of this fact by plaintiff, made his preliminary decree according to the allegations of the petition and the aforesaid false agreed statement of facts, and the commissioners appointed by the Court charged J. W. Zacharie with all the sales made of the land in his life time, and that plaintiff, P. De Cordova, was not charged for any of said sales, although he and J. De Cordova had been paid therefor in full. In the original bill it is alleged that the amount of land in the Rionda grant sold by J. W. Zacharie or his agents, J. and P. De Cordova, was about 10,000 acres, exclusive of the sale by J. W. Zacharie to Joseph L. Smolenski; that the commissioners fell into this error by the fraudulent suppression, as aforesaid, by P. De Cordova of the facts above stated, and your complainants have in this way been divested of a part of their land and property; and it is further stated in both the original and amended bills that all of the proceedings and steps taken in the procurement of the judgment in the suit of P. De Cordova in Freestone Co. against complainants were the result of a conspiracy and combination between P. De Cordova and his attorney, W. R. Boyd, to obtain an unjust and inequitable judgment against your complainants and that they succeeded. The complainants further charge that P. De Cordova had no interest or title, in fact, in the Rionda grant to any part thereof; that the contract of February 26th, 1852, was barred by limitation under the statutes of Texas in an action for specific performance, the only right of action he had; that in the suit in Freestone Co., Texas, 7326 acres were set apart to P. De Cordova; that under no state of facts could he be entitled to more than 4784 acres,

if he held an absolute deed to one-sixth undivided interest, as alleged by him in his petition in said Rionda grant; and they charge that in the partition made, the only land upon which complainants had improvements in the way of farms and houses was set apart to P. De Cordova and being the most valuable part of complainants' land, and unimproved land of comparatively little value was set apart to complainants; that J. W. Zacharie died June 1st, 1870, and complainants are his only heirs. The land in controversy is of the value of $21,100. The complainants are citizens of Louisiana; the defendants are citizens of Texas, except Smolenski, whose residence is unknown. The original bill shows that complainants knew nothing of the pendency of the suit in the State Court and heard nothing of said suit and the judgment therein until long after the rendition thereof, they being cited by publication.

This embraces a synopsis of the facts charged in the original bill and its amendment, setting forth the facts alleged to be fraudulent. Record, pp.

The bill was dismissed for want of jurisdiction of the matter in controversy. The complainants excepted in open Court and the exception was allowed. Record, p. . The complainants prayed that an appeal be allowed and the question of jurisdiction of the Circuit Court may be certified to the Supreme Court and upon this petition the following order was made, that the appeal be granted to complainants and bond therefor fixed at $500, which is approved by the Court; that the appeal is granted solely upon the question of jurisdiction of the Circuit Court of the subject matter in controversy, which is certified to the Supreme Court of the United States, and the appeal is allowed in open Court at the term at which the judgment is rendered. Record, p. .

Argument.

As is disclosed by the above statement, the sole question in this case is whether the United States Circuit Court had jurisdiction of the subject matter in controversy. This question is raised by the demurrers of the respondents found in the record, p. . For the purpose of this argument, the demurrers admit the truth of the allegations of the bill and its amendment. The diverse citizenship of the complainants and the respondents, the amount or value of the lands in controversy at $21,100, the frauds practiced by P. De Cordova and his attorney are all admitted, and the sufficiency of the allegations of fraud in the procurement of the judgment in the State Court was not challenged, nor the truth thereof questioned, and the sole ground of the judgment of the Court dismissing the bill was based upon the proposition that an adequate remedy existed in the State Court under Arts. 1375 to 1378, inclusive, quoted above from our State Statutes, and provided a remedy which the complainants, who are non-residents of the State, and cited by publication, are bound to pursue.

Our first assignment of error is this: "The bill shows that this Court had jurisdiction of the subject matter in controversy." Record, p. . This assignment challenges the correctness of the judgment of the Court and embraces substantially the other assignments, and clearly presents the issue of law involved.

It is admitted, and the date of the filing of the original bill shows, that the complainants discovered the existence of the judgment rendered in the State Court before the expiration of two years from the date of that judgment, but not until long after its rendition. The question, then, reduced to its narrowest compass, is this: Is the remedy given to non-resident de-

fendants cited by publication by the Texas Statutes quoted above, exclusive of Federal jurisdiction, in a case in which the facts, such as diverse citizenship, amount involved and fraud in the procurement of a judgment exist and sufficient in themselves to give jurisdiction to the Federal Court? Is the bill of review given by the Texas Statutes exclusive of the jurisdiction of the Federal Courts in a new suit, founded upon new facts, arising in the course of a trial of which the defendants know nothing and which were not in issue in the original suit? The office of a bill of review under Art. 1375, Revised Statutes, is to procure a new trial. It is in addition to the remedy by appeal or writs of error. See Chrisman vs. Miller, 15th Tex., p. 159.

We are aware of the well established doctrine that this U. S. Circuit Court cannot act as a Court of Appeals to control the judgment of State a Court; nor will it act in a case where the bill shows that it is a continuation in effect of the original suit in the State Court, for the purpose of correcting errors or irregularities in the judgment of the State Court. The judgment rendered in the State Court in Freestone county is a final judgment, and not the less a final judgment, because the Texas Statute authorizes a bill of review within two years for the purpose of procuring a new trial. The statute leaves it entirely optional with our service by publication to making his application for a new trial within two years from the date of the judgment, and it would be a singular statute if it did not, but the effect of the statute is that if such application is not so made, the defendant cannot avail himself of the right afterwards. This Art. 1375 can have no effect whatever upon the right of non-residents, since by publication to file an original bill on the equity side of the docket in the Federal Courts, at-

tacking the judgment in the State Court for fraud in the procurement of the judgment upon a new state of facts not in controversy in the State Court. If the reverse of this proposition were true, then a State by its legislation might impair the jurisdiction of the Federal Courts and abridge the right of a citizen of another State to the equal protection of the laws of the United States.

It is said in the case of Smyth vs. Ames, 169 U. S., Par. 16, "that the adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court is not to be exclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to such in the Federal Circuit Court may invoke its jurisdiction in equity wherever the established principles and rules of equity permit such a suit in that Court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State Court in the same cause of action." This was said by this Honorable Court in response to the argument that the 5th Section of the Nebraska Statutes, authorizing railroads in certain cases to institute suit in the Supreme Court of the State, had in effect excluded the jurisdiction of the Federal Courts in the cases mentioned. The Legislature of Nebraska in this 5th Section had sought to make the jurisdiction of the State Supreme Court *mandatorily* exclusive of the Federal Courts, but it was to no purpose; this Court sustained the jurisdiction of the latter Courts in the cases and instances in which the State had correctly sought to exclude it.

Again, the attempt of the Legislature of Texas in organizing a Railroad Commission under the Constitution of Texas, amended for the purpose enlarging the power of the Legisla-

ture on that subject, to exclude the jurisdiction of the Federal Courts, met with a similar fate in the case of Reagan vs. Farmers' Loan and Trust Co., 154 U. S. 362, 391, in which it was said "Whenever a citizen of a State can go into the Courts of a State to defend his property against the illegal acts of its officers, a citation of another State may invoke the jurisdiction of the Federal Courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own Courts." See other cases referred to in this opinion by Justice Harlan.

In affect this Honorable Court decides that the jurisdiction of the Federal Courts and the State Courts in the cases mentioned in the Nebraska and Texas statutes is concurrent in both Courts, although these States in as strong terms as possible had sought to confine the jurisdiction to the State Courts, and that under the benign operation of the Constitution of the United States and the legislation thereunder, the non-resident has the choice of forums in which to vindicate his rights. In the case at bar, a different question is presented—this jurisdiction to pass upon a bill of review for the purpose of procuring a new trial is exclusively within the jurisdiction of the State Court and necessarily so, but because this is true, does it follow that no remedy exists in the Federal Courts to try and determine a new case upon a new state of facts not in controversy in the State Court, although growing out of facts transpiring in the course of the trial in the State Court and incidental to it?

Is the non-resident by force of State legislation be driven to pursue the remedy given by the State statute, and excluded from the Federal Courts in a new and different case, because he files his suit in the Federal Court within the period limited

for making his application in the State Court for new trial?

This seems to us to be a perversion both of the meaning of the State statute, and of the National legislation conferring jurisdiction in given cases upon the Circuit Courts of the United States, as well as a departure from the rules laid down in many cases decided by this Court.

The case more nearly in point upon this subject decided by this Honorable Court that we find is the case of Barrow vs. Hunton, 99 U. S. p. 8. The Louisiana code allowed an action of nullity to be brought in the the State Court where the original cause was tried to set aside a judgment for several causes, one of which was "when the defendant is condemned by default without being cited." Hunton had recovered a judgment in the State Court against Goodrich and another, Goodrich filed a petition in the Court in which the judgment was recovered praying for an injunction and basing his application for relief upon the ground that no lawful service of the petition and citation in the suit had ever been made on him and for other causes set forth. Hunton removed the case to the Circuit Court of the United States, alleging he was a citizen of the State of Missouri. A motion to remand to the State Court was made and overruled, and the Circuit Court of the United States made a final decree dismissing the bill, etc. The action of the Circuit Court was reversed upon the ground that causes of nullity relating to form, of which Hunton's was one, could not be brought in the U. S Circuit Courts or removed thereto. He questioned the regularity of the judgment because there was no lawful service of the petition and citation upon him, which was held to relate to form and regularity of the proceedings of the State Court. Justice Bradley in his opinion says: "It shows that in the estimation of the Legislature of

Louisiana (discussing the various articles of the Louisiana code) there is a manifest propriety in submitting the question of the validity to the Court which rendered it, or to the Court which has the right to revise the judgment by way of appeal. We are not disposed to allow this consideration to operate so far as to make it an invariable criterion of the want of jurisdiction in the Courts of the United States. If the State Legislatures could, by investing certain Courts with exclusive jurisdiction over certain subjects, (as in the Nebraska and Texas cases *supra*), deprive the Federal Courts of all jurisdiction, they might seriously interfere with the right of the citizen to resort to those Courts. The character of the cases is always open to examination for the purpose of determining whether, *ratione materiæ*, the Courts of the United States are incompetent to take jurisdiction thereof." The reasoning of the Court strongly leads to the inference that had the nullity of the State judgment arisen out of the fact that it had been obtained through fraud, bribery, etc., relating to the merits, that it might have presented a case which could have been removed to the Federal Court, although the Louisiana code in its 607th Article made such facts grounds for the proceeding of nullity in the State Court. But be that as it may, Goodrich or Barrow's case presented only facts challenging the regularity of the proceedings in the State Court, while the case we present makes no question of this sort, and is in no sense an effort to set aside the State judgment for irregularity or errors but assails it for fraud in its procurement, in the conduct of the cause from its inception to its end, in impositions practised upon the State Judge and in the falsity of agreed statements upon which the judgment was based.

The case we make falls within the principles announced in

Gaines vs. Fuentes, 92nd U. S., p. 10; Johnson vs. Waters, 111 U. S., p. 640, 667, and Arrowsmith vs. Gleason, 129 U. S. p. 86-101, to which we will refer more fully hereafter. In the argument below the case of Nougui vs. Clapp, 101 U. S., p. 551, was much relied upon by the respondents for the purpose of showing a want of jurisdiction in the United States Circuit Court. This also was a Louisiana case. Justice Miller says: "Complainant in this bill entered his appearance in that suit (in the State court) at a proper stage of it to enable him to contest the right of Clapp to have the property sold. The usual mode in the courts of Louisiana of contesting the right to foreclose a mortgage is by obtaining an injunction, after which the rights of the parties are judicially determined by the court, complainants appeared and obtained an order for such an injunction. If this order was not obeyed, it was for that Court and not this to give remedy." The complainant stated in his bill that he had obtained an order from the Court for an injunction, but the clerk refused to issue it, and this refusal of the clerk was a part of the fraudulent conspiracy to cheat him. It is manifest from reading the facts in this case that by some appropriate proceeding in the State Court in a case in which he had appeared, he should have caused the order of the Court to be obeyed, and had the mandate of the Court enforced. This case is distinguished from Marshall vs. Holmes and Johnson vs. Waters and Arrowsmith vs. Gleason, and kindred cases in the first of these cases mentioned above. Nougui having entered his appearance in the case, was charged with notice of what was happening in his presence, and if there was fraud, or a fraudulent combination to cheat him, he must have perceived it when the clerk refused to issue the injunction, and from all that appears from the allegations of his

bill, this fraud must have been known to him before the final decree in the State Court, and he acquiesces in the judgment until he filed his suit in the United States Circuit Court. Clearly a case with such facts cannot constitute a precedent for the case made by the complainants in their bill. The case of Arndt vs. Griggs, 134 U. S., p. 316, was much relied upon in argument to show that Texas had the right to enact legislation that could enable the citizen to have titles within its limits to real estate adjudicated as against non-residents who are brought into Court by publication.

This right our bill in no way questions, nor do we question it, and we repeat what we have before stated that not only has Texas enacted such legislation, but that the provisions of the Texas statute upon that subject were scrupulously pursued in the Freestone county proceeding, resulting in a judgment against complainants which is perfectly valid to all intents and purposes, unless it is vitiated by the frauds committed in its procurement, which are stated at length in the original bill and its amendment.

The case of Johnson vs. Waters, 111 U. S., p. 640, seems to us more in point than any of the cases we have referred to. These facts are stated at considerable length in the opinion of the Court, and we will not attempt to state them further than to invite attention to some of the artifices resorted to in applications for orders of sale to the parish Court. Buckner, as natural tutor of his minor child, Mollie Buckner, and other creditors, filed his petition in the parish Court asking for an order of sale, and representing that he, as tutor of his minor child, is a creditor by a judgment of the District Court in said parish. The executor of Oliver J. Morgan, deceased, intervened in this application and joined Buckner in the prayer for an order to sell,

upon the ground that the estate was indebted to the creditors mentioned in Buckner's petition and various others, and there were no funds on hand to pay these claims.

The order was granted by the Parish Judge. Before the day of sale arrived, one of the attorneys, who had signed the application for an order of sale as attorney for the executor, filed another application for the sale of the interest of Julia Morgan in the lands of Oliver J. Morgan, which the petition declares that she claimed to be a three-fourths undivided interest, which was alleged to be incumbered by a mortgage to secure the heirs of Oliver H. Kellom, and the petition prays that the proceeds of such sale may be paid by preference to the settlement thereof. This petition was duly considered by the Parish Judge and the order was made.

Justice Bradley, in the opinion, says: "The claim, therefore, that the debt due from Oliver J. Morgan and his succession to Oliver H. Kellom, Jr. (if any such debt existed) was a first lien upon the lands of the succession, secured by mortgage, and entitled to be first paid, was entirely unfounded." He further says that this pretended debt, secured by mortgage, was artfully used in all these proceedings to produce the impression that the estate would be absorbed by these preferred claims. He further says that the entire interest of Julia Morgan in her father's property was subject, at his death, to all his debts. Claims were put forward in these applications that were unfounded and untrue, and the Parish Judge was either deceived by them, or must have believed that if he knew of the unfounded character of the claims urged in these petitions that the proceeds of sales could be afterwards properly distributed according to the legal rights of the creditors. An order to sell the lands to pay the creditors should have been granted, per-

haps, regardless of the claims that were asserted in the petitions, but on the decree made on the last petition, it is ordered "that the undivided interest of Mrs. Julia Morgan, deceased, in said land (claimed to be three-fourths) be sold at public sale, in order to pay said debt," of whose existence Justice Bradley was skeptical. Under such an order her interest could only have been sold to pay this debt.

The Parish Judge in making the decree or order of sale was manifestly imposed upon by the representations made in these applications, or we must conclude that he was in the conspiracy to defraud the creditors of Oliver J. Morgan, a conclusion not warranted by the facts. It is true that the combination was carried on afterwards up to the time of the sale to deter bidders from bidding on the lands that were sold by virtue of the judicial orders, and that in effect the heirs of Oliver J. Morgan remained in possession of the lands of the estate to the detriment of the creditors, who were practically frozen out. We quote again from the opinion: "The next question is, whether the complainant is in a situation to contest the validity of the sale by the present suit. It is contended that he is concluded by the proceedings in the Probate Court of Carroll parish, which is alleged to have had exclusive jurisdiction of the subject matter, and its decision is alleged to be conclusive against all the world, but especially against the complainant, who was a party to the proceedings. The administration of Gen. Morgan's succession undoubtedly properly belonged to the Probate Court of the parish of Carroll, and, in a general sense, it is true that the decisions of that Court in the matter of the succession are conclusive and binding, especially upon those who were parties. But this is not universally true. The most solemn transactions and judgments may, at the instance of the

parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a Court of equity relief against fraud. It is generally parties that are the victims of fraud. The Court of Chancery is always open to hear complaints against it, whether committed in pais or by reason of judicial proceedings. In such cases the Court does not act as a Court of review, nor does it inquire into any irregularities or errors of proceeding in another Court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage they have derived under it." Judge Bradley then quotes from Barrow vs. Hunton, 99 U. S., p. 80, to the effect that, "if the proceedings (in the U. S. Circuit Court) are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding. * * * A new case arising upon new facts, although having relation to the validity of an actual judgment or decree, etc." We refer also to the case of Jackson vs. Ludeling, 21 Wallace, p. 616, in this connection. The demurrer to the complainants' bill and amendment admit for the purposes of this case the truth of the allegations of fraud in the procurement of the judgment in Freestone county, and the sufficiency of the fraud to set aside the judgment, but the contention is that the State Court having acquired jurisdiction of the subject matter, its judgment is conclusive; and the complainants are without remedy, no matter what fraud prevailed in the procurement of the judgment, except in the manner and form pointed out by the State statute. In other words, as we understand the argument, it is that the State statute having prescribed a remedy, no other can be pursued in any other forum, although the facts exist which give

that other forum jurisdiction of a case growing out of facts occurring in the trial in the State Court, but which were in no sense in controversy in the latter Court. The argument limits the well understood rule that non-residents cannot be deprived of their choice of forums to those cases only which have not for their object the setting aside and annulling of judgments for fraud in their procurement; and when this is sought to be done, they are compelled to adopt those modes of procedure prescribed by the State, and in the forum where the judgment is obtained. This confounds all distinction between a bill of review and an original proceeding upon new facts not before in controversy. We think the cases to which we have referred heretofore show the fallacy of any such opinion. In conclusion, we observe that it is one of the characteristics of fraud in its movements to comply with the forms prescribed by law, and to conceal its purpose under the regularity of its proceedings—it assumes all colors, like Iris, when sent on a mission from Olympus:

> **"Downward the wondrous goddess took her flight,**
> **And drew a thousand colors from the light."**

It is Protean in shape—it is sometimes bold and defiant; at other times timorous and cringing, but at all times artful; but whatever may be its mien, it is the office of a Court of Equity to expose its operations and nullify their results. Judicial proceedings cannot sanctify a fraud; they only make more difficult the investigation set on foot to discover its existence. Happily in the present instance the trail of the serpent is found in the record of the Freestone county case. In the decision of this cause, we invoke that spirit of equity that gives to each and every man his own.

Respectfully submitted,

F. C. ZACHARIE,

Solicitor for Complainants and Appellants.

No. 246.

FILED
APR 12 1900
JAMES H. McKENNEY,
Clerk.

Bf. of Ward for D. Co

Filed April 12, 1900.

CAUSE PENDING

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1898

AMELIA L. HOWARD ET AL., Plaintiffs in Error.

vs.

P. DeCORDOVA ET AL., Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Texas at Dallas.

BRIEF AND ARGUMENT FOR THE DEFENDANTS IN ERROR

R. H. Ward
and
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NEWS PRINTING CO., AUSTIN, TEXAS.

No. 758.

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Statemcnt of the Nature and Result of this Suit.

In view of the fact that the plaintiffs in error have not yet filed any brief in this cause and furnished a copy to counsel for the defendants in error, it becomes necessary for the defendants in error to set forth a substantial statement of the nature and result of this cause.

This is an equity cause in which plaintiffs in error filed an original bill on the 7th day of July, 1898, against defendants

in error seeking to set aside a judgment of the District Court of Freestone County, Texas, a court of general jurisdiction of the State of Texas.

The grounds upon which the plaintiffs in error attacked the judgment of the said State Court are set forth at length in their bill, and are substantially as follows, to-wit: That the plaintiffs in error are the sole surviving heirs of one J. W. Zacharie, deceased, who was the owner of the land in controversy, and who made a contract with P. DeCordova and Jacob DeCordova, by which said P. DeCordova and Jacob DeCordova undertook to have the Manuel Riondo 11league grant of which said Zacharie was the owner, placed on the map of the State of Texas, and compromise adverse claims to same, in consideration of the agreement on the part of the said Zacharie that said DeCordovas shol,d for their services, become entitled to a one-third interest in all of the Manuel Riondo grant, which should be secured by compromise or survey for said Zacharie (Record, p. 24). It being recied in said agreement that a power of attorney had been executed of even date therewith by said Zacharie authorizing his said attorneys to represent him in the establishment of his grant, and in the compromise and sale of any and all portions thereof: (Record, p. 24). That on November 9th, 1895, the said P. DeCordova filed a suit in the District Court of Freestone County, Texas, against the unknown heirs of J. W. Zacharie and against Joseph Smolenski, whose residence was alleged to be unknown, for a partition of the Manuel Riondo grant, and that afterwards on the 8th day of September, 1896, the District Court of Freestone County, Texas, appointed R. L. Williford, a practicing attorney of said court, to represent the unknown heirs of J. W. Zacharie and Joseph Smolenski, and thereafter at a regular trial of said cause rendered a judgment in partition, setting aside in said partition proceeding which was in all things regular and in full compliance with the laws of the Stateof Texas.

the 7326 acres in controversy, and also the 192 acres in controversy. (Record, p. 15).

That in said suit in the District Court of Freestone County, Texas, service by publication was obtained upon the unknown heirs of J. W. Zacharie and Joseph Smolenski, the same being made in a newspaper not published at the County Seat, but in an obscure journal published in Freestone County, at a point remote from said County Seat, whereby no notice could be given to said heirs of their authorized agent in said County; That W. R. Boyd was the attorney for P. DeCordova in said suit, and made affidavit to procure service by publication, and that said W. R. Boyd had prior thereto on May 16th, 1892(addressed to one of defendants in error, J. S. Zacharie, a letter set forth in the record, on page 16, and that at the time of making said affidavit, both P. DeCordova and W. R. Boyd knew the names and residences of the heirs of J. W. Zacharie; that the defendants Hill, Robertson, Parker and McAdams are setting up a claim to portions of the land in controversy under deeds from W. R. Boyd with notice of the rights of the plaintiffs in error, and of the infirmity of the title conveyed by Boyd; that when service of citation by publication had been obtained in accordance with the laws of the State of Texas, and plaintiffs in error had not appeared in person or by attorney, the laws of the State of Texas provide that a new trial may be gained by the court upon an application of the defendant in the cause for good cause shown supported by affidavit at any time within two years from the date of the rendition of the judgment ;that the said J. W. Zacharie, the deceased father of the plaintiffs in error, was the owner of said eleven leagues of land in Freestone and Anderson Counties, granted to Manuel Riondo, and that he made the contract hereinbefore referred to with said Jacob and P. DeCordova; that in pursuance of this contract Jacob and P. DeCordova made some compromises or sales to those who claimed under junior grants, the exact amount

of which the plaintiffs are unable to state, but that same amounted to about ten thousand acres; that the same were made prior to 1861, and the said DeCordovas made a settlement with J. W. Zacharie in accordance with the terms of the contract aforesaid, the said DeCordovas receiving one-third of the amount for which said lands had been sold, and paying over two-thirds thereof to said Zacharie, and yet said Zacharie was charged in the partition proceeding with all of these lands, and the DeCordovas charged themselves with nothing; that on May 7th, 1860, Jacob DeCordova acknowledged in writing a settlement with J. W. Zacharie of said compromises, and released to said Zacharie all of his right in and to the Manuel Riondo grant by virtue of said contract, and that this relinquishment destroyed and annulled the said contract as to P. DeCordova also; that nothing was done thereafter by either of said DeCordovas under said contract, unless the dismissal of some suits in the United States District Court at Austin should be deemed an attempt to perform said contract by P. DeCordova until the institution of the partition suit in the District Court of Freestone County, Texas, on the 9th day of November, 1895; that said contract of February 26th, 1852, with Jacob and P. DeCordova was simply an agreement to convey to them one-third of the land of the Riondo grant that said DeCordovas might secure with a clear title by compromise or survey; that notwithstanding the plain import of said contract, said P. DeCordova and W. R. Boyd conspired and confederated together to deprive the plaintiffs in error of their land, and said W. R. Boyd filed the aforesaid suit in the District Court of Freestone County, Texas, on November 9th, 1895, and beguiled the court into the belief that said contract dated February 26th, 1852, was a deed or transfer by J. W. Zacharie to Jacob and P. DeCordova of one-third of the entire Riondo grant less the sales made thereof, and that said suit for partition was brought upon the allegation that the plaintiff, P. DeCordova, was

the owner in fee simple of a one-sixth interest in said land; that in pursuance of said confederation, the said P. DeCordova conveyed to W. R. Boyd 792 acres of land out of said Riondo grant, more specifically described by metes and bounds in said original bill and that the same was conveyed as a fee to said Boyd for prosecuting said suit in the District Court of Freestone County, Texas; that in pursuance of the partition proceeding in said District Court of Freestone, County, Texas, 7326 acres of land was set aside as the interest of said P. DeCordova, which said land is more specifically described by metes and bounds in said original bill, and a final judgment was entered in favor of said P. DeCordeva for said land; that said P. DeCordova was not entitled to a partition of the Riondo grant for the reason that he had no interest therein, and for the further reason that the said P. DeCordova had an action of specific performance upon the contract of February 26, 1852, which action plaintiffs in error allege that they believe had been abandoned by said P. DeCordova for more than 20 years, and that the same was barred by the statutes of limitation of the State of Texas, and if not barred, that the same could not have been enforced because of non-performance on his part and payment in full for his partial performance prior to 1860; that if said P. DeCordova was entitled to a partition of the unsold part of the Riondo grant, yet the partition by the District Court of Freestone County, Texas, was grossly unjust to them, because the 7326 acres set apart to P. DeCordova included all the improved and cultivated land on said grant and are the best lands in said grant, while the lands set apart to said plaintiffs in error lie largely in the Trinity River bottom, are subject to overflow, and remote from railway transportation; that about ten thousand acres of the Riondo grant had been sold or compromised and about ten thousand acres lost by prescription under junior locations, leaving about twenty-eight thousand, seven hundred and eight (28,708) acres belonging to

plaintiffs in error, and that one-sixth of this amount would be 4,784 acres, the utmost amount that said P. DeCordova could claim under said contract; that no land had been secured for plaintiffs in error by said DeCordovas out of said grant which had not been fully accounted for for to said DeCordova, and that at the date of the institution of the suit in Freestone County, plaintiffs in error did not owe P. DeCordova either any money or any land by virtue of the contract of 1852; that J. W. Zacharie, the ancestor of plaintiffs in error, so construed said contract, and sold the unsold balance of said Riondo grant to one Joseph Smolenski, estimating the number of acres so undisposed of at from twenty-seven thousand to thirty thousand acres, for which Smolenski agreed to pay fifteen thousand dollars, and gave his notes therefor; that in the deed made by said J. W. Zacharie to said Joseph Smolenski, it is provided that the vendor retains a lien on the land sold to secure the payment of said notes, and that if any of said notes remain unpaid for six months after due notice, the vendor should have a right to cancel and annul the sale, and re-enter and take possession of the land; that said notes of said Smolenski, though due for 20 or 30 years past, have never been paid, and that the plaintiffs in error have possession of them and will produce them on the trial of this cause, but that the deed to said Smolenski has been recorded in Freestone County, Texas, and the same casts a cloud upon the title of the plaintiffs in error; that the land in controversy is of the value of $2.60 per acre, making the aggregate sum of $21,100.00.

Plaintiffs thereupon prayed that the judgment of the District Court of Freestone County, Texas, and all of the conveyances made by said DeCordova and said Boyd of the land in controversy be cancelled and annulled, and that they have a writ of restitution and possession for the land described in the original bill, and that the deed made by J. W. Zacharie to J. Smolenski be

cancelled as a cloud upon the title of the plaintiffs in error. (For full text of original bill, see Record, pp. 1 to 7.).

To this original bill were appended as exhibits all the proceedings in the District Court of Freestone County, Texas, in the partition suit referred to, showing the same to be in all things regular and in full compliance with the statutes of the State of Texas.

On the 10th day of January, 1899, the plaintiffs in error filed in the Circuit Court of the United States their amended original bill, setting forth substantially the same facts contained in their original bill, and containing some immaterial allegations of additional fraud on the part of W. R. Boyd and P. DeCordova, all of which will be found in said original bill on pages 20 to 23 of the record, and attaching thereto the original agreement between Zacharie and DeCordovas (Record p. 24) and also the conveyances sought to be cancelled (Record pp. 26 to 34) and also the original deed from J. W. Zacharie to Joseph Smolenski, (Record, pp. 34 to 37) together with all of the notes executed by said Smolenski in the payment of the land sold to him by J. W. Zacharie (Record, pp. 39 to 42.)

Defendants in error on the 10th day of January, 1894, filed in the Circuit Court of the United States the following demurrer, to-wit: "These defendants respectfully by protestation not confessing or acknowledging all or any of the matters and things in said plaintiffs' amended bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that: First, it appears from the face of plaintiffs' amended bill that the bill seeks to set aside, cancel and annul the judgment of the District Court of Freestone County, Texas, and that this court has no jurisdiction or power to cancel, set aside or annul the judgment of a State Court, said court having jurisdiction both over the subject matter and the persons in said suit, said suit being a partition suit and the proceeding one in rem. Second, the amended bill shows upon its

face that the object of the bill is to obtain a new trial in this court in cause No. 1960, tried and determined in the District Court of Freestone County, Texas, as shown by the exhibits to the bill under and in accordance with Art. 1375 of the Revised Statutes of the State of Texas; that this proceeding is but a continuation of said suit, and this court has no jurisdiction of the same, but the District Court of Freestone County alone has jurisdiction thereof. Third, that the judgment of the District Court of Freestone County, Texas, is valid and binding upon all of the parties to this suit, and this court has no jurisdiction, power or authority to review or to cancel and annul the same for the pretended fraud set out in plaintiffs bill or for any other cause therein stated. (Record, p. 43.)

The defendants in error also filed the following special demurrers to the several portions of the amended bill therein referred to, to-wit: First, they demur to that part of said bill which refers to the alleged contract made on the 26th day of February, 1852, between Jacob DeCordova and P. DeCordova and J. W. Zacharie, and say that the same is insufficient because said contract is not set forth so that this court can construe and determine the same, and because said bill shows that said contract was read in evidence in the said suit by the exhibits to plaintiffs' bill, and was by said court construed, and the construction put upon the same is binding upon plaintiffs in this cause, and this court has no power to reverse the action of said court in that regard. Second, they demur to that part of said amended bill which sets up the statutes of limitation as to DeCordova's right to maintain the partition suit in Freestone County, Texas, and the allegation that the contract had been abandoned by him, and also the allegation attacking the fairness of said partition in said court as to the quantity and quality of the land awarded by the decree of partition, and they say that each and all of the matters were entirely within the jurisdiction of said District Court of Free-

stone County, Texas, and the action of said court in regard thereto was and is binding upon these plaintiffs and on this court, and that this court has no jurisdiction or power to revise the action of said court, as is clearly shown by all of the allegations of said bill. (Record, p. 44.)

This cause then came on for a hearing in the said Circuit Court of the United States for the Northern District of Texas at Dallas, before the Hon. E. R. Meek, judge, upon the demurrers of the defendants in error to the amended bill filed in this cause, and thereupon the said Circuit Court rendered a judgment dismissing the bill of the plaintiffs in error for want of jurisdiction of the matter in controversy, decreeing all costs against them, from which judgment the plaintiffs in error have prosecuted their writ of error in this court upon the following assignments of error: First, that the bill shows that the Circuit Court of the United States at Dallas had jurisdiction of the subject matter in controversy. Second, that the bill shows that the matter in dispute exceeds exclusive of interest and costs the sum of five thousand dollars. Third, that the bill shows that the controversy is between citizens of different States. Fourth, that the bill shows that the proceedings in said court in the case of P. DeCordova vs. the unknown heirs of J. W. Zacharie were unknown to the complainants through the fraud of respondent, there being service by publication only upon complainants in said suit in the said court, until long after the rendition of the judgment therein; that there was no personal citation of them, and no appearance by them as parties to said proceeding. Fifth, that the bill shows on its face that it is an original proceeding upon new facts not disclosed in the proceedings in the State Court attacking the judgment of the said court for fraud in the procurement thereof by the respondents, P. DeCordova and W. R. Boyd, and not a bill seeking to review the judgment of the State Court for any irregularity or error therein.

PROPOSITIONS COUNTER TO FIRST ASSIGNMENT OF ERROR OF PLAINTIFFS IN ERROR.

First—The jurisdiction of a United States Court is dependent upon citizenship, and an averment of residence is insufficient, but there must be an allegation of the citizenship of the defendants in order to confer jurisdiction upon the court.

Second—Where there are two defendants in a United States Court who are citizens of different States, the court will not have jurisdiction of the cause, and therefore the residences of the various defendants must be alleged in order to show jurisdiction in the court.

STATEMENT.

Plaintiffs in error allege in their original and amendsd bills that all of the defendants are citizens and inhabitants of the State of Texas, except Joseph Smolenski, who is alleged not to be an inhabitant of, or found within the district where the suit is filed (Record, p. 1). The residence and citizenship of Smolenski are not alleged anywhere in either bill to be in the State of Texas or any other state; nor is his residence alleged to be unknown. This action is a bill in equity to which Smolenski was a necessary party in order to enable plaintiffs in error to divest title out of him, and thereby in any event entitle them to a recovery against the other defendants. (See allegation as to Smolenski's title, Record, p. 6.)

AUTHORITIES.

Smith vs. Lyon, 133 U. S. Spr. Court, p. 315, bottom p. 635 Co-op. Ed.

Timmons vs. Eylton, 139 U. S. Spr. Court, p. 378, bottom p. Co-op. Ed.

ARGUMENT.

The bill of complainants alleges that P. DeCordova is a citizen of Travis County, Texas, in the Western district of Texas, and that the other defendants are citizens of Freestone County, Texas, in the Northern District of Texas, except J. Smolenski, who is not alleged to be a citizen and inhabitant of any State, the allegation of the bill being as follows: "Who is not an inhabitant of or found within this district." No service appears in the record upon said Smolenski, and no answer is found in his behalf. There must certainly be some allegation showing such citizenship in Smolenski as would entitle this bill to be maintained. This is a proceeding in equity, and Smolenski is a necessary party, because he is entitled to have the right to come in and perfect his title if it is defective by the payment of his notes, alleged to remain unpaid, and the judgment of the District Court of Freestone County, Texas, could not even by proper proceeding in that court have been reviewed by the plaintiffs in error herein without making Smolenski a party to that suit in order to reinvest title in the plaintiffs in error. The bill does not allege that J. Smolenski's residence is unknown, but on the contrary, the allegation of the bill implies that it is known, because it is averred that he is not an inhabitant of the district in which the bill is filed. If Smolenski be a citizen of Louisiana, the Circuit Court had no jurisdiction, because he and the rest of the defendants would then be citizens of different States.

PROPOSITIONS COUNTER TO THE FOURTH AND FIFTH ASSIGNMENTS OF ERROR OF THE PLAINTIFFS IN ERROR:

First—The amended bill filed by plaintiffs in error in the trial court shows on its face that the Circuit Court of the United States at Dallas, Texas, had no jurisdiction of the subject matter in controversy.

Second—Where the judgment of a State Court of competent

jurisdiction is rendered upon a service by publication regular in all things, and in full compliance with the statutes of the State in which it is rendered, the Circuit Court of the United States has no jurisdiction to cancel or set aside said judgment upon a bill in equity therein attacking same upon the grounds of fraud, when a method of procedure is provided by the laws of the State, which method is still open to the party attacking the judgment.

STATEMENT.

It appears from the allegations of the amended and original bills of the plaintiffs in error and the exhibits attached thereto showing all the proceedings had in the District Court of Freestone County, Texas, (Record, pp. 8 to 16) that the judgment of partition rendered therein is a valid and binding judgment of a court of competent jurisdiction in the State of Texas. There is no pretense that there are any irregularities in said proceedings, save and except the allegation that the service of citation by publication was published in a paper remote from the County Seat of Freestone County, Texas, but it appears from the exhibit set out in plaintiffs' original bill that this publication was made in the Wortham Vindicator, a newspaper published in the County of Freestone, and was therefore a publication in full compliance with the law. (Record, p. 11.)

AUTHORITIES.

Revised Statutes of Tex., Arts. 1235 and 1236. 1375

Revised Statutes of Tex., Arts. 1504A. to 1504F.

Pierre Nougue vs. Emery Clapp, 101 U. S. Spr. Court, p. 551, bottom p. 1026 Co-op. Ed.

John Randall et al. vs. Jacob Howard, 67 U. S. Spr. Court, p. 585, bottom p. 269, Co-op. Ed.

Marshall vs. Holmes, 141 U. S. Spr. Court, 589, bottom p. 870, Co-op. Ed.

Simmons vs. Saul, 138 U. S. Spr. Court, p. 439, bottom p. 1054, Co-op. Ed.

ARGUMENT.

It is respectfully submitted that the bill of complainants is wholly without any equity, and states no facts that could in any event authorize a Circuit Court of the United States to interfere with a judgment rendered by the District Court of Freestone County, Texas, nearly two years before the filing of the original bill herein. The judgment of the State Court was based upon a proceeding in every respect regular and in strict compliance with the statutes authorizing it.

The plaintiffs in error were alleged in the original suit to be unknown, but the statutes of the State of Texas authorized service by publication in all cases where the defendants were non-residents, as well as where they were unknown, and it appears from the allegations in the bill of the plaintiffs in error itself, that when this suit was filed they were all citizens of the State of Louisiana, and therefore, even if P. DeCordova or his attorney, W. R. Boyd, had known the places of their residence, it was not incumbent upon them to serve them personally in the State of Louisiana.

The allegation contained in the bill that a fraud was perpetrated by reason of the publication of the service in a paper not published at the County Seat of Freestone County, Texas, certainly in no event could avail these plaintiffs in error, because the statute of the State of Texas authorizing such service only requires publication in any paper published at any point in the County where the suit is filed, and the record attached to the bill of the plaintiffs in error shows that this publication was made in accordance with the statute in a paper published in the town of Wortham, in the County of Freestone. The District Court of Freestone County, therefore, acquired full and complete jurisdiction of this cause, and had a right to decide all the questions which are now sought to be reviewed by this separate and distinct proceeding in the Circuit Court of the United States, and its judgment, until reversed, is binding upon every other court.

The bill filed in this cause seeks to bring in review various matters and questions of fact as well as of law which were passed upon in the progress of the suit in the District Court of Freestone County, and it is now sought in the Circuit Court of the United States to cancel and annul the decree of partition based upon evidence heard by the trial judge of a separate and distinct jurisdiction. This is a direct and positive interference with the original authority of a State Court.

If there was error in the proceedings of the State Court, as alleged in the bill, the same could have been reviewed by an appeal or writ of error within the time provided for by the laws of this State, but this remedy has not been pursued. If the judgment of the District Court of Freestone County, Texas, was not supported by the evidence, as alleged in the bill, then this could have been reviewed upon appeal, as a statement of facts was properly filed and is attached as an exhibit to the bill of the plaintiffs. (See Record, p. 12.)

In the case of Marshall vs Holmes, 141 U. S. Spr. Court, 589 bottom p. 870, Co-op. Ed., Mr. Justice Harlan, in the latter part of the opinion states the correct rule which must be applied to cases of this character. In discussing the case of Nougue vs. Clapp, the learned judge says: "Here the resemblance between that case and the one before us ends, for in that case it did not appear, nor was it alleged that the facts constituting the fraud were not before the rendition of the decree within the knowledge of the party seeking its annulment, of could not have been discovered in time to bring them in some appropriate mode to the attention of the court while the decree was within its control, for aught it appears that suit was brought simply to obtain a rehearing in the Circuit Court of the United States sitting in equity of issues that were or by proper diligence could have been fully determined in the suit at law in a State Court. The relief there asked could not have been granted consistently with the rule that

equity will not interfere with a judgment at law even where the party has an equitable defense, if he could, by the exercise of diligence have availed himself of that defense in the action at law to which he was a party. This requirement of diligence is as it ought to be enforced with strictness."—Arts. 1504 A. to 1504 E. of the Revised Statutes of the State of Texas, provide the procedure by which a defendant may be sued in a Texas court who is a non-resident or whose residence is unknown. Under these articles of the statute, this suit was brought and properly conducted to a final judgment in strict compliance therewith, all of which fully appears from the exhibits attached to the original bill of the plaintiffs in error.

Arts. 1235 and 1236 of said Revised Statutes, prescrie the manner in which service shall be had in cases of this character. Art. 1375 of the Revised Statutes of the State of Texas, provides that in all cases in which judgment has been rendered on service of process by publication where the defendant has not appeared in person, or by an attorney of his own selection, a new trial may be granted by the Court upon an application of the defendant for good cause shown, supported by affidavit filed within two years after the rendition of such judgment. The judgment of the District Court of Freestone County, Texas, was rendered on the 28th day of September, 1896, and the original bill in this cause was filed on the 7th day of July, 1898, less than two years after the rendition of the judgment sought to be atacked in this proceeding. It, therefore, appears that the District Court of Freestone County, Texas, under the laws of the State of Texas, was still open to the plaintiffs in error for a review and correction of the judgment therein rendered.

Under the laws of the State of Texas, this judgment did not become absolutely final until two years had elapsed after its rendition. The courts of Texas, therefore, were open to the plaintiffs in error for the assertion of any right they might have had, and

a method of procedure was prescribed by the statutes of that State by which the judgment against them could be reviewed, corrected and set aside. Under Art. 1375 of the Revised Statutes of Texas, the suit sought to be maintained in the Circuit Court of the United States is really but a continuation of the original suit filed in the District Court of Freestone County, Texas, and that court was the proper jurisdiction in which to continue the proceeding and review the action of the trial judge. This honorable court has already passed upon the question of the power of a State by statute to provide for the adjudication of titles to real estate upon a citation by publication against unknown persons and non-residents.

In Arndt vs. Griggs, 134 U. S. Spr. Court, p. 316 bottom p. 918 Co-op. Ed., it has been held that a State has such power, and that the procedure established by the State in this respect is binding upon Federal Courts.

In this State it has been prescribed that such actions can be maintained, and that service by publication upon non-residents and unknown persons shall be sufficient; that an attorney shall be appointed by the trial judge to represent such defendants, and that no judgment by default shall be taken, but that the evidence shall be heard by the court, and a statement thereof shall be reduced to writing and filed with the court, and the judgment shall be rendered thereupon, and it is further provided that this judgment shall not absolutely be final until two years shall have elapsed, but that such non-residents and unknown persons may at any time within said period of two years, upon proper cause shown by affidavit, have this judgment set aside, and a new trial granted them. This being true, and the courts of Texas being open to the plaintiffs in error, the procedure established by the State must be held to be binding upon Federal Courts, and the plaintiffs must be required to resort to the State Courts in accordance with their procedure to establish their rights.

(Simmons vs. Saul, 138 U. S. Spr. Court, 439, bottom p. 1059 Co-op. Ed.

If the doctrine contended for by plaintiffs in error could be maintained, it would have the effect of depriving the defendants in error of the right to have the State Court, which rendered the judgment in their favor, review its own judgment in a case where at the time of the filing of the bill, the said scribed in such specific cases as the one in which the judgment was rendered. The effect of the bill in this case and the District Court of Freestone County was still open to them and of now seeking to annul this judgment by a separate suit in another jurisdiction.

It is earnestly insisted that the Circuit Court of the United Sates had no jurisdiction of this cause, and that the action of the trial judge in dismissing the bill was in all things correct.

R. H. Ward

Counsel for Defendants in Error.

Ashley S. Lanier

HOWARD *v.* DE CORDOVA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 246. Argued and submitted April 17, 1900.—Decided May 14, 1900.

Following *Cooper* v. *Newell*, 173 U. S. 555, it is held that the judgment of the Texas court which is attacked in this case may be the subject of collateral attack in the courts of the United States, sitting in the same territory in a suit between citizens of Louisiana and citizens of Texas.

By c. 95, §§ 13, 14 of the Laws of Texas of 1847 and 1848, the affidavit by the plaintiff or his attorney as to the want of knowledge of the names of the parties defendant or their residence is made an essential prerequisite of the jurisdiction of the court to issue an order for publication. In the state court the affidavit was therefore jurisdictional in its character, and its verity was directly assailed by the averments of the present bill, which were admitted by the demurrer.

By their original bill the complainants, alleging themselves to be citizens of the State of Louisiana, complained against P. De Cordova, a citizen of the State of Texas, residing in Travis County, W. R. Boyd, F. E. Hill, Charles Robertson, J. M. Parker and George W. McAdams, citizens of Texas and residents of Freestone County, and against Joseph Smolenski, as to whom it was merely alleged he "is not an inhabitant of or found within this district." The grounds for relief which it is necessary to notice for the purposes of the questions before us, averred in the original bill and an amendment thereto, were as follows: That the complainants were the sole legal heirs of J. W. Zacharie, their deceased father, who during his lifetime was a citizen and resident of the State of Louisiana; that their said deceased ancestor owned a tract of eleven leagues of land

situated in Freestone and Anderson Counties, Texas, which had been granted to Manuel Riondo, by the states of Coahuila and Texas; that on the 26th of February, 1852, their said father made a contract with Jacob and Phineas De Cordova, by which the two last named persons agreed to have the grant above mentioned properly placed upon the records, to endeavor to effect compromises with certain parties holding claims by junior locations covering some of the land in the grant; that by the agreement in question all expenses except the taxes were to be paid by the two Cordovas, and in consideration of their services they were to receive one third of the receipts derived from the sale of all the land which might be covered by the compromises to be effected as aforesaid. It was alleged that in pursuance of the contract the two De Cordovas made various compromises with persons claiming under junior grants, and that the land thus embraced, the exact amount of which was not alleged, although it probably equaled ten thousand acres, was sold, and they received their share of the proceeds resulting from the sale. It was charged that in 1860 Jacob De Cordova acknowledged in writing that a full settlement had been made with him by Zacharie for all the lands as to which compromises had been made, and he therefore declared that all and every right which had vested in him by the contract in question had been liquidated and settled. It was then averred that on the 9th of November, 1895, Phineas De Cordova, with the object of defrauding complainants of their right and title to the land aforesaid, filed in the district court of Freestone County, Texas, a suit in partition, in which he falsely alleged himself to be the owner of an undivided one sixth of the land situated in the Riondo grant; that this suit was brought against the unknown heirs of J. W. Zacharie, deceased, and against Joseph Smolenski, whose residence was also in said suit alleged to be unknown. At the time this suit was thus brought by De Cordova it was averred that both he and Boyd, the attorney who represented De Cordova in the suit, knew who were the heirs of J. W. Zacharie and where they resided, but that in order to defraud and to avoid notice to them of the suit, and to obtain summons by publication as required by the law of Texas, an affidavit was

made by William R. Boyd, the attorney, that the heirs of Zacharie and their residences were unknown; that, predicated upon this affidavit, the order for publication was given by the court; that instead of publishing the notice at the county seat, it was inserted in a newspaper in a remote portion of the county, and that the complainants had no knowledge whatever of the suit until long after its termination; that in this suit for partition an attorney was subsequently appointed to represent the unknown and absent defendants; that the law of the State of Texas required that a statement of facts should be made by the judge, but that one was prepared by Boyd, representing De Cordova, and the attorney who had been appointed to represent the absent defendants, which had for its effect to produce upon the mind of the court the impression that under the contract aforesaid, made between the Cordovas and Zacharie, the Cordovas were entitled as owners to one third of the eleven leagues of land; that being misled to that conclusion, after proceedings as required in partition suits, a decree of partition was entered. The complaint as amended made other charges of fraud and deception which it is unnecessary to recapitulate. As to the other defendants to the bill, except Smolenski, it was averred that they had acquired with full notice of the fraud, which it was charged had been operated upon the Zacharie heirs by the partition suit as aforesaid, portions of the land in question. Smolenski was made a party to the bill because of the following averments: After the adjustment alleged to have been made between Zacharie and De Cordova, it was stated that Zacharie had sold all the land in August, 1865, to Smolenski for the price of $15,000, evidenced by his notes as follows: One for $3000 dated May 1, 1866, and twelve notes of $1000 each, payable yearly thereafter, with eight per cent interest per annum from May 1, 1866; that in the deed to Smolenski it was stipulated that a vendor's lien should be retained on the land to secure the payment of the notes, and it was provided that if any of the said notes should remain unpaid for six months after maturity, the vendor should have *ipso facto* the right to cancel and annul the sale and reënter and take possession of said lands. It was then averred that none of the notes given by Smolenski

had ever been paid, although past due for twenty or thirty years.

The prayer of the bill was that the proceedings in partition and the decree directing the same, be adjudged to be fraudulent and void; that the sales made to the other defendants be also declared fraudulent and void, and that the deed made by Zacharie to Smolenski to be set aside and cancelled, and the cloud thereby "cast on your orators' title to said land be removed."

To the bill and the amendment thereto the defendants demurred on the following grounds:

"First. It appeared from the face of plaintiffs' amended bill that the bill seeks to set aside, cancel and annul the judgment of the district court of Freestone County, State of Texas, and this court has no jurisdiction or power to cancel, set aside or annul the judgment of the state court, said court having jurisdiction both over the subject-matter and of the persons in said suit, said suit being a partition suit and the proceeding one *in rem*.

"Second. The amended bill shows upon its face that the object of the bill is to obtain a new trial in this court in cause No. 1960, tried and determined in the district court of Freestone County, Texas, as shown by the exhibits to the bill, under and in accordance with article 1375 of the Revised Statutes of Texas.

"That this proceeding is but a continuation of said suit, and this court has no jurisdiction of the same, but the district court of Freestone County, Texas, alone has jurisdiction of the same.

"Third. That the judgment of the district court of Freestone County, Texas, is valid and binding upon all of the parties to this suit, and this court has no jurisdiction, power or authority to review or to cancel and annul the same for the pretended fraud, as set out in plaintiffs' bill, or for any other cause therein stated."

After hearing, the court sustained the demurrer and dismissed the suit "for want of jurisdiction of the subject-matter in controversy," and the correctness of its action in so doing is the question which arises on this appeal.

Mr. F. C. Zacharie for appellants.

Mr. R. H. Ward and *Mr. Ashby S. James* for appellees, submitted on their brief.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

That the court erred in sustaining the demurrer and dismissing the suit for want of jurisdiction over the subject-matter of the controversy, has been in effect conclusively settled by this court in a case decided since the action of the court below was taken. *Cooper* v. *Newell*, 173 U. S. 555. In that case suit had been brought in a court of the State of Texas in the ordinary form of trespass, to try title by Peter McGrael against Stewart Newell, the defendant. It was alleged in the suit that the plaintiff was a resident of Texas, and that the defendant was also a resident and citizen of that State. An answer was filed in the cause by an attorney at law in the name of the defendant, and the suit proceeded to judgment. The controversy decided in *Cooper* v. *Newell* thus arose: Newell filed his bill in the Circuit Court of the United States in and for the Eastern District of Texas, in the ordinary form of trespass, to try title to recover the land to which the suit of *McGrael* v. *Newell* had related. He charged that the defendants claimed title under the judgment rendered in that suit, but that they had no title because he, Newell, had never resided in the State of Texas; had not authorized any attorney to appear for him in the suit, and that, therefore, the proceedings in *McGrael* v. *Newell* were as to him *res inter alios acta*, and wholly void. The controversy turned on whether Newell could be heard in the Circuit Court of the United States to attack the judgment of the state court, it being contended that the fact that Newell was represented by an attorney at law, who appeared and filed an answer in his name, was conclusively established by the judgment, which could not be assailed collaterally in a court of the United States, however much it might be subject to direct attack for fraud in the courts of the State of Texas. The contention was

not maintained, it being decided that as the charges went to the jurisdiction of the state court such question of jurisdiction could be examined in the courts of the United States whenever the judgment of the state court was presented as a muniment of title. The alleged facts in the case before us bring it directly within this ruling. By chapter 95, sections 13 and 14, Laws of Texas 1847 and 1848, page 129, the affidavit by the plaintiff or his attorney as to the want of knowledge of the names of the parties defendant or their residences, is made an essential prerequisite of the jurisdiction of the court to issue an order for publication. In other words, a summons by publication can only take place when the essential affidavit is previously made. In the state court the affidavit was therefore jurisdictional in its character; and its verity was directly assailed by the averments of the present bill which were admitted by the demurrer. Besides this decisive consideration, the proceedings in the state court, whatever may have been their efficacy as a defence to the charges of fraud contained in the bill, as to which we express no opinion, were not adequate to defeat the jurisdiction of the Circuit Court of the United States. In other words, they address themselves not to the jurisdiction of the court, but to the merits of the cause. *Huntington* v. *Laidley*, 176 U. S. 668.

Whilst the demurrer which the court below maintained was predicated solely on the fact that there was a want of jurisdiction because of the proceedings had in the state court, which the bill assailed for want of jurisdiction and fraud, we have observed that the citizenship of Smolenski is not averred in the bill. This defect was curable by amendment, and it was not only within the power but the duty of the court, on its attention being called to the fact, to have allowed such an amendment to be made. It follows that

The judgment must be reversed and the cause be remanded for further proceedings in conformity with this opinion, and it is so ordered.